No. 96-1710 APR 28 1997

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES FIRE INSURANCE COMPANY
and INTERNATIONAL INSURANCE COMPANY,

Petitioners,

—v.—

NATIONAL GYPSUM COMPANY, n/k/a Asbestos Claims Management Corporation, NGC SETTLEMENT TRUST, and CENTER FOR CLAIMS RESOLUTION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the scope of a United States District Court's power to protect its own judgment, codified by the All Writs Act, 28 U.S.C. § 1651, includes the power to enjoin arbitration of issues previously adjudicated between the same parties by that court.

II. Whether the District Courts may properly resolve the preclusion effects of their own prior judgments, rather than leave those issues for arbitrators to decide.

III. Whether the All Writs Act, 28 U.S.C. § 1651, affords litigants a right to judicial enforcement of the preclusive effect of federal judgments that is not waived absent clear evidence that a party has done so.

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Pursuant to Rule 29.6 Petitioners, United States Fire Insurance Company and International Insurance Company certify that their parent corporations are, in ascending order, as follows:

United States Fire Insurance Company:

Crum & Forster Holdings, Inc.

Talegen Holdings, Inc.

Xerox Financial Services, Inc.

Xerox Corporation

International Insurance Company:

The Resolution Group, Inc.

Xerox Financial Services, Inc.

Xerox Corporation

There are no non-wholly owned subsidiary companies of United States Fire Insurance Company or International Insurance Company.

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Petitioners, United States Fire Insurance Company and International Insurance Company, request that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit entered in this action on November 5, 1996, which reversed a permanent injunction entered by the United States District Court for the Southern District of New York enjoining an arbitration.

CITATIONS TO DECISIONS BELOW

The opinion of the Court of Appeals is reported at 101 F.3d 813. (App. 1a). The opinion of the district court is an unreported decision which may be found on Westlaw at 1995 WL 413278 (S.D.N.Y.). (App. 11a).

BASIS FOR JURISDICTION

The opinion of the Court of Appeals was entered on November 5, 1996. (*See* App. 27a). Petitioner's petition for rehearing and suggestion for rehearing *in banc* was denied on January 30, 1997. (App. 25a). The United States Supreme Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The statutes involved are the All Writs Act, 28 U.S.C.A. Section 1651 (1994 Ed. & Supp.) and the Federal Arbitration Act, 9 U.S.C.A. Sections 1-12. (1970 Ed. & Supp.) The text of the statutes involved is set out in the appendix hereto. (App. 40a and 40a to 48a, respectively).

STATEMENT OF THE CASE

A. Nature of the Dispute

Petitioners, United States Fire Insurance Company ("U.S. Fire") and International Insurance Company ("International")

and Respondent, National Gypsum Company, now known as Asbestos Claims Management Trust ("Gypsum") were previously involved in federal court litigation over the terms of certain excess insurance policies issued by U.S. Fire and International to Gypsum. The litigation culminated in a judgment in favor of Petitioners, that was subsequently affirmed on appeal. Thereafter, Gypsum sought to invoke the terms of a pre-existing arbitration agreement between the parties and relitigate the issue resolved by the federal judgment. The district court, which had resolved the issue and entered the judgment, exercised its authority under the All Writs Act, 28 U.S.C. § 1651, and enjoined the arbitration on the grounds of collateral estoppel. (App. 21a). The Court of Appeals reversed, holding that the preclusive effect of the prior federal judgment must be determined by an arbitrator rather than the court. (App. 3a). This ruling stands in direct conflict with decisions of several other Circuit Courts of Appeals which, under various theories, hold that the preclusive effect of a prior federal judgment is a determination to be made by the court. Petitioners urge Supreme Court review of the decision by the Court of Appeals below to resolve the conflict among the circuits over the important federal law question of who decides the preclusive effect of a prior federal court judgment on a subsequent attempt to relitigate issues in arbitration.

B. The Prior Federal Court Action

In December 1986, Stonewall Insurance Company filed a declaratory judgment action in the United States District Court for the Southern District of New York against Gypsum and thirty-seven of Gypsum's other primary and excess insurers, including U.S. Fire. Stonewall sought a declaration of its rights, obligations and duties under liability insurance policies issued to Gypsum with regard to asbestos-in-buildings claims for which Gypsum sought indemnification. Gypsum, in turn, counterclaimed against Stonewall and crossclaimed against the insurer defendants, including U.S. Fire, seeking a

determination of the indemnity and defense obligations of each insurer under their respective policies of insurance. Gypsum also filed a third-party complaint against International seeking a declaratory judgment as to International's obligations to indemnify and defend Gypsum for asbestos-in-buildings claims. (*See* App. 4a).

On March 22, 1993, the district court entered a partial declaratory judgment in the *Stonewall* case which incorporated rulings holding that the U.S. Fire and International policies did not contain an obligation to pay defense costs for property damage claims. *Stonewall Ins. Co. v. National Gypsum Co.*, No. 86 Civ. 9671 (S.D.N.Y. March 22, 1993). These rulings were subsequently affirmed on appeal. *Stonewall Ins. Co. v. Asbestos Claims Mgt. Corp.*, 73 F.3d 1178 (2nd Cir. 1995). (*See* App. 4a to 5a).

C. The Wellington Agreement

U.S. Fire, International and Gypsum are signatories to the Agreement Concerning Asbestos Related Claims dated June 18, 1985 (the "Wellington Agreement"). (App. 49a). The Wellington Agreement provides for the administration, defense, payment and disposition of asbestos-related bodily injury claims between signatory asbestos producers and their subscribing insurers. (App. 52a). The Wellington Agreement contains an arbitration provision that calls for resolution of "any disputed issues within the scope of the agreement" by alternative dispute resolution ("ADR") and incorporates the procedures by which ADR proceedings are to be conducted. (App. 61a, VIII ¶6).

D. The Present Action

In November 1993, seven months after the rulings of the district court in *Stonewall*, and during the pendency of Gypsum's appeal, Gypsum sought to initiate an ADR to arbitrate U.S. Fire's and International's obligation to pay Gypsum's

defense costs for asbestos bodily injury claims under the same excess policies that had been adjudicated in *Stonewall*. (*See* App. 5a). Gypsum took the position that the *Stonewall* court's ruling on the defense obligation question was limited to property damage claims, notwithstanding the undisputed fact that the policy terms do not address the defense obligation differently for bodily injury and property damage claims.

Without waiving their assertion that the ADR was barred by the *Stonewall* court's judgment on the defense obligation issue, U.S. Fire and International engaged in efforts to mediate the dispute with Gypsum. These efforts were unfruitful.

1. The District Court Proceedings and Basis for Jurisdiction Below

In December 1994, Gypsum sought to initiate binding arbitration. U.S. Fire and International moved in the United States District Court for the District of New Jersey for an order enjoining the ADR on the grounds that the *Stonewall* judgment had resolved whether U.S. Fire and International owed a defense obligation to Gypsum and thus precluded ADR to relitigate that issue. The district court had subject matter jurisdiction under 28 U.S.C. § 1332, because the matter in controversy exceeds $50,000, exclusive of interest and costs, and the parties have diverse citizenship. The district court, on its own motion, transferred the case to the Southern District of New York in order that the district court judge who had decided *Stonewall* could hear the matter. (App. 29a to 36a). The diversity of citizenship requirement for subject matter jurisdiction, pursuant to 28 U.S.C. § 1332, was unaltered by the change in venue to the Southern District.

There, the district court that had adjudicated *Stonewall* granted U.S. Fire and International's motion for injunctive relief and denied Gypsum's crossmotion to compel arbitration. (App. 23a to 24a). The district court held that the declaratory judgment rulings in *Stonewall* were issue dis-

positive and preclusive, because the identical policies and policy language relevant to defense, which Gypsum sought to arbitrate, were construed in *Stonewall* and applied to defense obligations on all claims, whether for bodily injury or property damage. (App. 21a).

2. The Appellate Court Proceeding

The Court of Appeals reversed, holding that the issue preclusion question was for an arbitrator to decide, not the district court. (App. 3a). The court determined that the issue-preclusive effect of a prior federal judgment, unlike the threshold determinations of arbitrability and the "arbitrability of arbitrability," was not a "higher-order question" that litigants would reasonably assume a judge, not an arbitrator, would decide. (App. 9a). Rather, the court concluded that the preclusion effect of the prior federal judgment was, like any other affirmative defense, merely a component of the parties' dispute on the merits. (App. 9a to 10a). On this basis, the Court of Appeals determined that the issue preclusion question was one within the agreement to arbitrate and therefore required arbitration. (App. 6a). The appeals court further appeared to suggest that parties to arbitration agreements waive their right to judicial enforcement of federal judgments, when arbitrable issues are resolved in prior litigation of claims not otherwise subject to the agreement to arbitrate between the same parties. (App. 9a). The Court of Appeals thus held that the question of whether a collateral estoppel effect is to be given to an earlier federal judgment is for an arbitrator to decide.

E. Reasons For Granting The Writ

This case involves an important question of federal law: Whether the scope of a federal district court's power to protect its own judgments includes the power to enjoin the arbitration of matters previously adjudicated between the same parties by the court. Four Circuits, the Third, Fifth, Eighth

and Eleventh, have answered this question in the affirmative, holding that a court may properly address the preclusive effect of the prior judgment. The Court of Appeals for the Second Circuit, in contrast, has answered the question in the negative, holding that the preclusive effect of a federal court judgment must be decided by an arbitrator, and not by the court that issued the judgment. The Sixth Circuit has attempted to fashion a hybrid approach which permits arbitral review in the first instance, but ultimately binds arbitrators to the preclusive effect of the prior federal judgment. Petitioner's seek review on Certiorari because the conflict among the Circuits of the United States Courts of Appeals on the important federal law question of who—court or arbitrator—decides the preclusive effect of a prior federal judgment renders the issue ripe for Supreme Court resolution. Rule 10 (a) and (c).

ARGUMENT

I. REVIEW BY THE SUPREME COURT UPON WRIT OF CERTIORARI IS NEEDED TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS AS TO WHETHER THE FEDERAL COURTS OR ARBITRATORS DECIDE THE PRECLUSIVE EFFECT OF A PRIOR FEDERAL JUDGMENT ON A SUBSEQUENT ARBITRATION.

The Third, Fifth, Eighth and Eleventh Circuits hold that the preclusive effect of a prior court judgment upon a subsequent arbitration is to be decided by the courts. *In re Y&A Group Sec. Litig.*, 38 F.3d 380, 382 (8th Cir. 1994); *Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, 985 F.2d 1067, 1069 (11th Cir.), *cert. denied*, 114 S. Ct. 600 (1993); *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 499 (5th Cir. 1986); *Telephone Workers Union, Local 827 v. New Jersey Bell Tel. Co.*, 584 F.2d 31, 33 (3d Cir. 1978). While grounding their rulings on various theories, the unifying theme of these deci-

sions is that the broad injunctive powers of the courts to protect the integrity of their judgments includes the power to enjoin arbitration to prevent the abusive relitigation of previously adjudicated claims and issues. In this regard, the Eighth and Eleventh Circuits squarely hold that the powers codified under the All Writs Act, 28 U.S.C. §1651, include the power to enjoin the relitigation of adjudicated disputes in arbitration in order to protect the integrity of prior federal judgments from collateral attack by disappointed litigants and to afford finality to those parties who prevail on disputed claims and issues in court. *In re Y&A Group Sec. Litig., supra*, 38 F.3d at 382-383 (8th Cir.); *Kelly v. Merrill Lynch, etc., supra*, 985 F.2d at 1069 (11th Cir.).

The Second Circuit, in contrast, holds in the case at bar that arbitrators must decide the issue-preclusive effect of a court's prior judgment upon a subsequent arbitration, rather than the court that rendered the judgment. The Second Circuit does not attempt to harmonize the public policy interests the All Writs statute and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "Arbitration Act" or "FAA"), are intended to promote. Rather, the court focuses exclusively on the presumption favoring the arbitrability of merits-related issues, and erroneously relies on cases holding that certain procedural defenses to arbitration, such as waiver and laches, are to be decided in arbitration. (App. 6a to 7a). Only by declining to recognize that the preclusion doctrines present the threshold issue of whether there even exists a justiciable controversy to refer to arbitration, and by failing to acknowledge the distinction between affirmative defenses—such as laches and waiver—and the preclusion doctrines, which implicate judicial action rather than the pre-litigation conduct of parties, does the Second Circuit reach the conclusion that "issue preclusion, like other defenses to arbitrability, is arbitrable, and, because issue preclusion can be arbitrated, it must be arbitrated." (App. 6a).

The theme running through the Second Circuit's decision is that judicial resolution of the preclusion effect of federal judgments does violence to the Arbitration Act and the federal policy favoring arbitration. In fact, the decisions of the Third, Fifth, Eighth and Eleventh Circuits, which uphold judicial determination and enforcement of the preclusive effect of prior court judgments, harmonize the policy goals of the Federal Arbitration Act and the All Writs Act without violence to either. In contrast, the Second Circuit's decision severely attenuates the inherent powers of the district courts to preserve the integrity of their judgments, and frustrates the paramount purpose for which the civil courts were established: the resolution of disputes within their jurisdiction with finality.

Given the limited standard of review set forth in Section 10 of the Arbitration Act for merits-related decisions by arbitrators, the Second Circuit's holding may have the effect of placing the merits of an arbitrator's preclusion determination beyond the scope of independent judicial review. By opening the door to the potential relitigation of questions of fact and law previously adjudicated in court, the Second Circuit's ruling creates the very real threat for inconsistent decisions on identical substantive issues. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, ___ U.S. ___, 115 S. Ct. 1920, 1923 (1995) (standard of review of merits-related arbitral decision is exceedingly narrow; courts may set aside arbitrator's award only on grounds set forth under 9 U.S.C. § 10: where award is procured by corruption, fraud or undue means; or where the arbitrator exceeded his authority). Thus, the decision below presents dissatisfied federal court litigants with a potentially effective means to collaterally attack a valid federal judgment.

The Sixth Circuit has recently issued a decision that suggests the availability of an alternative approach somewhere between that of the Third, Fifth, Eighth and Eleventh Circuits on the one hand, and the Second Circuit on the other. *Aircraft*

Breaking Systems Corp. v. International Union, United Automobile, Aerospace and Agricultural Implement Workers, UAW, Local 856, 97 F.3d 155 (6th Cir. 1996). In *Aircraft Breaking*, the Sixth Circuit holds that arbitrators are "bound" by the preclusive effect of prior federal judgments, but "are generally entitled to determine in the first instance whether to give the prior judicial determination preclusive effect." *Id.* at 159. The underlying premise suggested by the Sixth Circuit's holding is that an arbitrator's failure to properly apply preclusion constitutes grounds for vacation of the arbitrator's award in a subsequent motion to vacate or confirm the award. However, the decisions of this Court hold that the submission of questions to arbitrators "in the first instance" may effectively place the arbitrator's determination of the merits of such questions beyond subsequent substantive court review. *See, e.g., First Options of Chicago, Inc. v. Kaplan, supra*, 115 S. Ct. at 1924 (1995). Thus, notwithstanding the Sixth Circuit's intention to hold arbitrators "bound" by the preclusive effect of prior federal judgments, an arbitrator's erroneous application of the rules of preclusion may not ordinarily allow for independent judicial review of that error. What the Sixth Circuit's decision manifests most clearly is the confusion and uncertainty that currently exists among the Circuits in their efforts to harmonize the competing public policy interests of both promoting the federal policy favoring arbitration and ensuring the integrity of federal judgments.

Given the confusion and conflict among the courts of appeals that have addressed the important questions presented by this Petition, and given the fact that these questions have yet to be addressed by this Court, Petitioners urge that Supreme Court review of the important issue of who decides —court or arbitrator—the preclusive effect of a prior federal court judgment upon a subsequent arbitration is needed to ensure the uniform application of federal law affecting the many thousands of litigants nationwide who avail themselves

to the dispute resolving authority of the federal courts and the alternate dispute resolution fora authorized by Congress.

II. FEDERAL COURTS HAVE BROAD DISCRETION TO ISSUE INJUNCTIONS TO PROTECT THE INTEGRITY OF THEIR PRIOR JUDGMENTS FROM COLLATERAL ATTACK, INCLUDING THE POWER TO ENJOIN ARBITRATION OF PREVIOUSLY RESOLVED ISSUES.

The All Writs Act affords Article III judges broad injunctive power to protect their judgments from collateral attack by disappointed litigants who seek to relitigate their disputes in an alternate forum. *Kelly v. Merrill Lynch*, *supra*, 985 F.2d 1067, 1069 (11th Cir. 1993). This Court

> has repeatedly recognized the power of a federal court to issue such commands under the All Writ's Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.

United States v. New York Telephone, 434 U.S. 159, 172 (1977). Thus, "[t]he All Writs Act makes plain that each federal court is the sole arbiter of how to protect its own judgments." *In Re Y&A Group Securities Litigation*, *supra*, 38 F.3d 380, 383 (8th Cir. 1994).

The Eighth and Eleventh Circuits squarely hold that the power codified under the All Writs Act "includes the authority to enjoin arbitration to prevent re-litigation." *Kelly v. Merrill Lynch Pierce, Fenner & Smith*, 985 F.2d at 1069 (11th Cir.); *In re Y&A Group Securities Litigation*, 38 F.3d at 382-383 (8th Cir.). As observed by the Eighth Circuit, "even when arbitration is involved, federal '[c]ourts should not have to stand by while parties re-assert claims that have already been resolved.' " *In re Y&A*, 38 F.3d at 382 (quoting *Kelly v. Merrill Lynch*, 985 F.2d at 1069). "No matter what, courts have the power to defend their judgments . . . , including the

power to enjoin or stay subsequent arbitrations." *Id.* The Court of Appeals for the Eighth Circuit has also recognized that "no other forum provides an adequate substitute for a court's action in protection of its own judgment," because the All Writs Act manifests Congress' intent to indirectly confer on the beneficiaries of federal judgments the right to judicial enforcement of those judgments. *In re Y&A*, 38 F.3d at 382 (citing *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 289 (1984) (holding that arbitration agreements do not preclude court adjudication of § 1983 civil rights claims)); *See also Kelly v. Merrill Lynch*, 985 F.2d at 1070 ("[A] district court [is] in the best position to decide whether [an] arbitration proceeding jeopardize[s] its prior judgment").

The Court of Appeals for the Fifth Circuit similarly holds that the federal courts may enjoin arbitration in order to afford full faith and credit to the res judicata effect of prior state court judgments, as mandated by 28 U.S.C. § 1738. *Miller Brewing Co. v. Fort Worth Distributing Co., supra*, 781 F.2d 494 (5th Cir. 1986). While the *Miller Brewing* court is silent on the question of why the court, rather than an arbitrator, should decide the preclusive effect of a prior state court judgment, a plain reading of the opinion clearly demonstrates the Fifth Circuit's understanding that a federal court is the only adequate forum to fulfill the statutory (and Constitutional) obligation to afford full faith and credit to state court judgments. *See Miller Brewing v. Fort Worth Distributing Co.*, 781 F.2d at 498 n.7 (noting the mandate of 28 U.S.C. § 1738).

The Third Circuit likewise holds that "the contention that a prior federal judgment determined issues . . . sought to be relitigated in an arbitral forum" requires that a federal court "first determine the effect of the judgment." *Telephone Workers Union v. N.J. Bell Tel., supra*, 584 F.2d 31, 33 (3rd Cir. 1978). In the Third Circuit's view, judicial review is necessary to prevent relitigation through arbitration, because the federal policy favoring arbitration "does not come into play

until the court first determines whether prior completed litigation has already finally determined all issues." *Telephone Workers Union v. N.J. Bell Tel.*, 584 F.2d at 33. While the Third Circuit did not expressly invoke the All Writs Act in its decision in *Telephone Workers*, it is plain from the text of the opinion that the court considered an injunction against arbitration as an appropriate exercise of the inherent powers vested in the courts to protect their prior judgments from collateral attack. *See, also, In re Hartford Textile Corp.*, 681 F.2d 895, 897 (2nd Cir. 1982) (per curiam), *cert. denied*, 459 U.S. 1206 (1983) ("The equity power of a court to give injunctive relief against vexatious litigation is an ancient one which has been codified in the All Writs Statute . . . .").

Thus, whether exercising the broad injunctive power of the federal courts to protect their own judgments through the All Writs Act, or affording full faith and credit to the judgments of state courts under 28 U.S.C. § 1738, or merely relying on the inherent power of the courts to protect their judgments from collateral attack, the above cited courts of appeals hold that the federal policy favoring arbitration agreements does not divest the federal courts of the primary power to determine the preclusive effect of prior judgments.

In a recent decision, *Aircraft Breaking Systems Corp. v. International Union, United Automobile, Aerospace and Agricultural Implement Workers, UAW, Local 856, supra*, 97 F. 3d 155 (6th Cir. 1996) the Sixth Circuit has undertaken a somewhat different approach. While holding that arbitrators are "bound by prior federal court decisions under the doctrines of collateral estoppel and/or res judicata," and "not free to ignore the preclusive effect of prior judgments," the Sixth Circuit opines that arbitrators "are entitled to determine in the *first instance* whether to give the prior judicial determination preclusive effect." *Aircraft Braking Systems Corp. v. International Union, United Automobile, Aerospace and Agricultural Implement Workers, UAW, Local 856*, 97 F.3d at 159 (emphasis added). As suggested in the court's use of the

words "in the first instance," the Sixth Circuit apparently envisions a *de novo* judicial review of the merits of an arbitrator's preclusion decision in a subsequent motion to confirm or vacate the arbitration award.[1]

However, this Court has stated that arbitral decisions may be set aside only in the "very unusual circumstances" set forth in Section 10 of the Arbitration Act. *First Options of Chicago v. Kaplan*, *supra*, 115 S. Ct. at 1923 (citing 9 U.S.C. § 10) (award procured by corruption, fraud, or undue means or where the arbitrator exceeds his authority). Otherwise, absent an arbitral award rendered in "manifest disregard" for the law, parties are bound by an arbitrator's decision. Thus, notwithstanding the Sixth Circuit's mandate that arbitrators are "bound" by prior federal judgments, by permitting arbitrators to decide "in the first instance" what preclusive effect, if any, is to be given an earlier federal judgment in a subsequent arbitration, the court may effectively place most arbitral preclusion rulings beyond the scope of the judicial review it clearly envisions, and actually applied in *Aircraft Braking Systems*.

In contrast to the holdings of the Third, Fifth, Eighth and Eleventh Circuits, and perhaps the spirit of the Sixth Circuit's decision in *Aircraft Braking Systems* as well, the Second Circuit has fashioned a rule which holds that where an agreement to arbitrate disputes exists, all merits-related defenses, even those involving the preclusive effect of a prior federal court judgment, must be arbitrated. In the Second Circuit's view,

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[1] Indeed, this is precisely what occurred in *Aircraft Braking Systems*, where the arbitrator had re-decided the threshold arbitrability of the parties dispute (*i.e.* whether a valid agreement to arbitrate existed at all) contrary to the district court's earlier resolution of that question. The district court vacated the arbitrator's award and the Sixth Circuit affirmed, holding that the arbitrator had exceeded his authority by deciding the arbitrability question—one "traditionally . . . answered by the courts"—and, further, that the arbitrator was collaterally estopped from re-deciding the existence of a valid agreement to arbitrate by the district court's prior arbitrability ruling. *Aircraft Braking Systems*, 97 F.3d at 160-161.

the collateral estoppel effect of a prior federal judgment is "plainly a question for the arbitrator rather than for the district court to decide," because it necessarily involves an interpretation of the parties agreement to arbitrate. (App. 7a to 8a). The Second Circuit sought to distinguish judicial resolution of questions concerning the preclusion effect of a prior judgment from those involving arbitrability and the "arbitrability of arbitrability" (*i.e.*, whether the parties have agreed to arbitrate, and who decides whether they have agreed to arbitrate). The Court of Appeals recognized that, by definition, resolution of threshold questions concerning arbitrability and the arbitrability of arbitrability require judicial review and interpretation of agreements to arbitrate, but concluded that the preclusive effect of a prior federal judgment was not a threshold issue requiring judicial resolution, because the preclusion doctrines are not "higher-order" questions. (App. 8a to 9a). In the Second Circuits' view, collateral estoppel and res judicata are merely legal defenses going to the merits of a claim or issue, which, like other merits-related defenses such as delay and waiver, must be arbitrated. (App. 9a to 10a).

In its analysis, the Second Circuit never explained how or why the policy considerations underlying the district court's authority to protect its prior judgment from collateral attack, codified by the All Writs statute, are superseded by those favoring arbitration of disputes under the Arbitration Act. In fact, the Second Circuit's decision avoids all discussion of the All Writs Act, its proper role in the enforcement and protection of federal court judgments, and its interplay with the FAA.

Moreover, the Second Circuit's conclusions concerning the roles of the related doctrines of res judicata and collateral estoppel ignore the fact that, alone among the various recognized legal defenses, the preclusion doctrines implicate judicial action, not merely the pre-litigation conduct of parties. Petitioners submit that the preclusion doctrines are indeed "higher-order" questions when their application impli-

cates a prior federal judgment, because the interests sought to be vindicated by their proper application in that context are central to the fundamental purpose for which the civil courts were established: "the conclusive resolution of disputes within their jurisdiction"; the "foster[ing of] reliance on judicial action by minimizing the possibility of inconsistent rulings"; and the protection of prevailing litigants from the "expense and vexation attending multiple lawsuits." *Montana v. United States*, 440 U.S. 147, 153-154 (1979). None of these interests are promoted by the Court of Appeals' decision in the instant case, but are in fact potentially subverted by it.

Perhaps the most basic tenet overlooked by the Second Circuit is that the final adjudication of a dispute between parties in a federal court proceeding extinguishes any justiciable controversy between them, leaving nothing to arbitrate. It is precisely this reasoning that undergirds the holdings of the Third, Fifth, Eighth and Eleventh Circuits that preclusion issues are to be decided by courts, rather than by arbitrators. *Telephone Workers Union, Local 827 v. New Jersey Bell Tel. Co.*, 584 F.2d at 33 (3d Cir.) (if "prior federal judgment determined issues now sought to be relitigated in an arbitral forum [the court] must first determine the effect of the judgment."); *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d at 499 (5th Cir.) ("[P]arties should be barred from seeking relief from arbitration panels when, under the doctrine of res judicata, they would be barred from seeking relief in the courts."); *In re Y&A Group Sec. Litig.*, 38 F.3d at 382 (8th Cir.) (same); *Fremont Cake & Meal Co. v. Wilson & Co.*, 183 F.2d 57, 59 (8th Cir. 1950) ("The controversy itself having been adjudicated, the proceeding to determine the procedure came too late as there was no controversy to arbitrate."); *Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, 985 F.2d at 1069 (11th Cir.) ("Courts should not have to stand by while parties re-assert claims that have already been resolved."). By preventing duplicative, vexatious litigation and enforcing the preclusive effect of prior court judgments, the judicial deter-

mination of collateral estoppel and res judicata questions perfectly harmonize the federal policy goals of the All Writs Act and the Arbitration Act.

In contrast, the potential net effect of the Second Circuit's decision is to render the finality and binding effect of a federal judgment vulnerable to the mere claim that an arbitration agreement alters the legal standard for decision from that which was applied by the federal court in the prior proceeding. While preclusion determinations cannot be divorced from consideration of the legal standards governing the arbitral and judicial proceedings, neither should a federal court be stripped of the power to look behind a claim of altered legal standard or any other difference asserted to defeat enforcement of the prior federal judgment. Absent the power to engage in this limited threshold inquiry, the binding effect of the prior federal judgment may be rendered illusory, and the central purpose of the preclusion doctrine severely undermined. This result may obtain because the merits-related decisions by arbitrators may only be set aside under the "very unusual circumstances" set forth under 9 U.S.C. § 10. (*See* App. 46a). If the district courts may not determine and enforce the preclusive effects of their own prior judgments, but must submit the preclusion question to an arbitrator, they may be foreclosed from ever reviewing the merits of a preclusion claim implicating their own prior judgments. Such an outcome, and the uncertainty and lack of finality it engenders, does nothing to foster reliance on judicial action. It does not protect the beneficiaries of federal judgments or minimize the possibility of inconsistent rulings. Nor does it advance the public policy interests arbitration is intended to promote; namely, the swift, certain, cost-efficient resolution of disputes.

III. THE FEDERAL COURTS, NOT ARBITRATORS, PROPERLY RESOLVE THE PRECLUSION DOCTRINE DEFENSES TO ARBITRATION WHICH IMPLICATE PRIOR FEDERAL COURT JUDGMENTS.

The fundamental precept of collateral estoppel or issue preclusion is that a question of fact or law " 'distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies.' " *Montana v. United States*, 440 U.S. 147, 153 (1979) (citation omitted). Stated otherwise, the issue preclusion doctrine mandates that once a court decides an issue of law or fact "necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allan v. McCurry*, 449 U.S. 90, 94 (1980). This Court has established that the related doctrines of collateral estoppel and res judicata are

> central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple law suits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana, 440 U.S. at 153-54.

Thus, collateral estoppel, or issue preclusion, protects "litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979). In this regard, the Court of Appeals for the Fifth Circuit has observed that "[t]he doctrine of res judicata, and its cousin collateral estoppel have probably done more to prevent useless and wasteful

litigation than arbitration ever could." *Miller Brewing Co. v. Fort Worth Distributing Co.*, *supra*, 781 F.2d at 497 n.3.

It is well-settled that the FAA expresses a policy favoring arbitration. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). Nor is there any question that, while courts can (and generally must) decide whether an issue is arbitrable or not, courts are not to decide the merits of any arbitrable issues. *E.g. First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1924 (1995); *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 218 (1985); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-404 (1967). This Court has long expressed the view that "the scope of arbitrable issues" includes the "construction of the contract language itself [and] any allegation of waiver, delay or a like defense to arbitrability." *Moses H. Cone Hosp. v. Mercury Construction Corp.*, 460 U.S. at 24-25.

However, the central role played by the doctrines of res judicata and collateral estoppel simply cannot be compared with affirmative defenses such as waiver, laches or any other time limitations defense. Nor has this Court ever held that the preclusive effect of a federal judgment is within the scope of arbitrable issues. On this basis, several Circuit Courts of Appeals hold that while arbitrators may decide affirmative defenses based on statutes of limitations, waiver, laches, and other similar defenses to arbitrability, the defenses of collateral estoppel and res judicata are preserved for judicial resolution. *See Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, *supra*, 985 F.2d at 1069 (11th Cir.); *Miller Brewing*, 781 F.2d at 499 (5th Cir.); *Telephone Workers Union v. N.J. Bell Tel.*, *supra*, 584 F.2d at 33 (3rd Cir.). The soundness of the distinction made by these courts between the preclusion doctrines and other affirmative defenses is evidenced by the fact that, alone among the generally recognized legal defenses, the preclusion doctrines implicate prior judicial action, whereas all other affirmative defenses are bottomed on the pre-litigation acts or omissions of parties. As observed by the

Court of Appeals for the Eleventh Circuit in distinguishing the preclusion defenses from other affirmative defenses, the preclusion doctrines are about protecting prior judgments. *See Kelly*, 985 F.2d at 1069.

This distinction is central to the questions Petitioners urge the Court to address under a grant of Certiorari. The gravamen of the issues presented in this case is not merely one of enforcing an arbitration agreement, as the Second Circuit suggests, but of protecting a valid federal judgment. Unless courts may enforce and protect their own judgments as res judicata or collateral estoppel, the true finality of such judgments may be put into substantial doubt, if not actually rendered constitutionally proscribed advisory opinions.

This concern is underscored by the fact that courts do not review an arbitrator's merit-related decisions de novo, but are limited to the highly deferential standard of review set forth at 9 U.S.C. § 10. *See First Options of Chicago, Inc., supra.* Therefore, if the Second Circuit's view that the scope of arbitrable merits-related issues includes the preclusive effect of a prior federal judgment stands uncorrected, the district courts may be deprived of any real opportunity to protect the integrity of their prior judgments from collateral attack in arbitration by disappointed litigants. Such an outcome unnecessarily opens the door to the possibility of abusive relitigation of previously resolved issues and, ultimately, to inconsistent rulings on the merits. Thus, rather than promoting the federal public policy favoring arbitration, the Second Circuit's ruling may discourage parties from entering upon agreements to submit certain categories of their disputes to arbitration. Because by agreeing to arbitrate, they may be held to have implicitly affected their right to rely on the finality of subsequent court judgments that resolve arbitral questions.

IV. THE ALL WRITS ACT CONFERS A STATUTORY RIGHT TO JUDICIAL ENFORCEMENT OF A FEDERAL COURT JUDGMENT TO THE BENEFICIARIES OF THE JUDGMENT, WHICH IS NOT WAIVED ABSENT CLEAR AND UNMISTAKABLE EVIDENCE THAT THE JUDGMENT BENEFICIARIES HAVE DONE SO.

In its decision below, the Court of Appeals for the Second Circuit claims to find additional support for its conclusions concerning

> the arbitrability of issue preclusion from the fact that the defense of issue preclusion is waivable in a second proceeding. If one can agree to waive collateral estoppel without consideration, one can agree to arbitrate the issue as part of a contractual scheme.

(App. 9a).

While the court's rationale is not clearly expressed, the Second Circuit appears to suggest that parties to arbitration agreements tacitly waive the right to judicial enforcement of the preclusive effect of subsequently rendered court judgments. The Court of Appeals creates a foundation for its apparent conclusion by refusing to recognize that the preclusion doctrines are "higher-order" questions, and by declining to even consider whether the All Writs Act confers a right to judicial enforcement upon the beneficiaries of federal judgments. Only by side-stepping the All Writs question and whether any rights it confers on litigants must be expressly waived, if they are to be waived at all, can the Second Circuit hold that judicial enforcement of the preclusive effect of subsequent federal judgments is tacitly waived by parties who agree to the arbitration of some of their disputes.

In contrast, the Court of Appeals for the Eighth Circuit holds that the district courts, and not arbitrators, are the best interpreters of a court's own judgments, and are the only adequate forum in which to protect and enforce those judgments,

because the All Writs Act confers an indirect right to judicial enforcement on the beneficiaries of federal judgments. *In re Y&A*, *supra*, 38 F.3d at 382-383. *See also Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, *supra*, 985 F.2d at 1069 (11th Cir.); *Miller Brewing Co. v. Fort Worth Distributing Co.*, *supra*, 781 F.2d 494 (5th Cir.). In *Y&A*, the Eighth Circuit observed that in *McDonald v. City of West Branch, Mich.*, this Court

> held that where 1) Congress intends a statute is "to be judicially enforceable" and where 2) a court concludes "that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under" that statute, prior arbitration cannot block court actions.

In re Y&A, 38 F.3d at 382 (citing *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 289 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)).

The Eighth Circuit has recognized that much as the statutes in *McDonald*, *Barrentine* and *Alexander*, *supra*, confer rights on certain classes of citizens, which are judicially recognizable notwithstanding pre-existing agreements to arbitrate or even the existence of prior arbitration awards, the All Writs statute confers an indirect right to judicial enforcement on the beneficiaries of injunctions and judgments. *In re Y&A*, 38 F.3d at 382. The Eighth Circuit further concluded that judicial enforcement of a federal judgment pursuant to the powers recognized by the All Writs Statute satisfies the second prong of the *McDonald* test because

> no other forum provides an adequate substitute for a court's action in protection of its own judgment. The All Writs Act makes plain that each federal court is the sole arbiter of how to protect its own judgments. . . .

Id. at 382-383 (citations omitted).[2]

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[2] While *In re Y&A Securities Litigation* involved the enforcement of a final judgment in a class action which incorporated a release and an

Corollary to the proposition that the All Writs statute confers statutory enforcement rights on the beneficiaries of federal judgments is the settled principle that courts must not assume that parties have agreed to arbitrate threshold questions concerning arbitrability and the arbitrability of arbitrability. Whether the parties have agreed to arbitrate and who decides whether or not they have so agreed, should not be assumed in absence of " 'clea[r] and unmistakabl[e]' " evidence that they have done so. *First Options of Chicago, Inc. v. Kaplan*, *supra*, 115 S. Ct. at 1924 (quoting *AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 649 (1986)). In *First Options*, this Court reasserted the principle that, while the FAA creates a strong presumption in favor of arbitrability, arbitration remains a matter of contract law. Its purpose is to resolve disputes, but only those disputes the parties have agreed to submit to arbitration. *First Options*, 115 S. Ct. at 1924. To this end, courts must ensure that arbitration agreements, like any other contracts, " 'are enforced according to their terms,' and according to the intentions of the parties." *Id.* at 1925. In *First Options*, the Court distinguished the presumptions governing a court's resolution of questions concerning the arbitrability of a dispute from those controlling resolution of who decides whether parties have agreed to arbitrate arbitrability. The Court observed that once a court has found that there is a valid agreement to arbitrate, any ambiguity as to whether a particular merits-related issue is arbitrable is resolved in favor of arbitration. *Id.* at 1924. But any uncertainty about who should decide whether the parties have agreed to arbitrate is resolved in favor of court adjudi-

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injunction against future claims covered by the release, the majority opinion makes clear that the existence of the injunction was not dispositive to its decision. Rather, the majority held "that the reasoning of [the Eleventh Circuit] in *Kelly* and [the Fifth Circuit] in *Miller Brewing* is dispositive of the issue of the district court's power" to enjoin arbitration under the All Writs Act. *In re Y&A*, 38 F.3d at 382. *Kelly* and *Miller Brewing* both involved prior court judgments not otherwise incorporating specific injunctive relief.

cation. *Id.* The Court explained this difference in treatment as follows:

> The [arbitrability] question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did not want to arbitrate a related matter. On the other hand, . . . the "who (primarily) should decide arbitrability" question [ ] is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

Id. at 1924-1925 (citations omitted).

Petitioners respectfully submit that compelling reasons exist for treating the question "who decides—court or arbitrator—the preclusive effect of a federal judgment" the same as the Court treated the question "who decides arbitrability."

Just as in the *First Options* "who should decide arbitrability" context, where a party might not focus on the "rather arcane" question of who they would want to decide arbitrability, a party negotiating the terms of an arbitration agreement has no reason to contemplate the question of who should decide the preclusive effect of arbitrable issues subsequently adjudicated in court in conjunction with claims not within the parties' arbitration agreement. Parties to arbitration agree-

ments enter into such contracts with the specific intention of avoiding the resolution of their disputes in court; they have no reason to even consider whether they would want the preclusive effect of a future court judgment decided by a court or an arbitrator. Simply stated, since judicial resolution of the merits of an arbitrable issue is neither intended nor anticipated when parties enter agreements to arbitrate a limited category of their disputes, the question "who should decide the preclusive effect of a court judgment" is completely inapposite to the considerations reasonably within the parties' contemplation at the time of their contractual undertaking to arbitrate.

It is therefore difficult to comprehend the Second Circuit's apparent suggestion that parties who agree to arbitrate effectively waive their right to judicial enforcement of federal judgments that subsequently resolve issues that would otherwise have been arbitrated. Given the well-settled "principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration," courts should hesitate to hold that a party has agreed to arbitrate the preclusive effects of future court judgments, absent clear and unmistakable evidence that it has done so. *See id.* at 1925 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985)). To do otherwise, may have the effect of forcing unwilling parties to arbitrate matters "they reasonably would have thought a judge, not an arbitrator, would decide." *Id.*

CONCLUSION

This case presents important questions concerning the proper application of federal law affecting litigants who avail themselves of the dispute resolving authority of the federal courts and the alternate dispute resolution fora authorized by Congress. The Courts of Appeals for several Circuits are in disagreement over the question of whether the scope of a federal district court's power to protect its own judgments, codified under the All Writs Act, includes the power to enjoin the arbitration of issues previously adjudicated by the same parties in federal court. For these and all of the foregoing reasons, Petitioners, United States Fire Insurance Company and International Insurance Company respectfully request this Court grant Certiorari to review the questions herein presented.

Respectfully submitted,

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Dated: April 25, 1997

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1761—August Term, 1995

(Argued: July 18, 1996 Decided: November 4, 1996)

Docket No. 95-7806

UNITED STATES FIRE INSURANCE CO.;
INTERNATIONAL INSURANCE COMPANY,

Plaintiffs-Appellees,

—v.—

NATIONAL GYPSUM CO., n/k/a Asbestos Claims Management Corporation; NGC SETTLEMENT TRUST,

Defendants-Appellants,

CENTER FOR CLAIMS RESOLUTION,

Defendant.

Before:

WINTER and LEVAL, *Circuit Judges*,
and THOMPSON, *District Judge*.*

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* Honorable Alvin W. Thompson, of the United States District Court for the District of Connecticut, sitting by designation.

Appeal from the issuance of an injunction by the United States District Court for the Southern District of New York (John S. Martin, Jr., *Judge*) against arbitration of an insurance dispute on the ground of collateral estoppel based on an earlier court decision. We hold that the claim of collateral estoppel is itself arbitrable and reverse.

MATTHEW L. JACOBS, Kirkpatrick & Lockhart LLP, Washington, DC (Julia Reynolds Johnson, Donald E. Seymour, and David M. Smith, of counsel), *for Defendants-Appellants*.

GEORGE R. HARDIN, Bumgardner, Hardin & Ellis, P.A., Springfield, New Jersey (Judson L. Hand, of counsel), *for Plaintiffs-Appellees*.

WINTER, *Circuit Judge*:

This appeal arises from Judge Martin's issuance of an injunction against arbitration of a dispute between National Gypsum Company and NGC Settlement Trust (collectively "NGC") on the one hand, and U.S. Fire Insurance Company ("U.S. Fire") and International Insurance Company ("International") on the other. NGC appeals from that injunction and the denial of a cross-motion for an order pursuant to Section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, compelling arbitration. The underlying dispute is over the allocation of

costs of defense against asbestos-related bodily-injury claims. Judge Martin held that the doctrine of collateral estoppel barred arbitration because of an earlier judicial decision. For the reasons set forth below, we believe that on the facts presented the issue of collateral estoppel is itself arbitrable and reverse.

BACKGROUND

The history of the litigation between these parties is set forth in detail in our earlier decision in *Stonewall Ins. Co. v. Asbestos Claims Mgt. Corp.*, 73 F.3d 1178, 1187-91 (2d Cir. 1995), and we therefore recount only briefly the factual background pertinent to this appeal.

The parties are among the signatories of an Agreement Concerning Asbestos-Related Claims dated June 19, 1985, known as the "Wellington Agreement" or "Wellington." This agreement was entered into between a number of producers of products containing asbestos on the one hand, including National Gypsum Company, now Asbestos Claims Management Corporation, and a number of their insurers on the other. Wellington resolved disputes regarding insurance coverage with respect to bodily-injury claims; it did not address insurance coverage disputes over asbestos-related claims involving property damage. Wellington established a procedure by which subscribing producers would submit bodily-injury claims to an Asbestos Claims Facility ("ACF") that would evaluate, defend, and settle the claims and pay settlements, judgments, and legal expenses incurred in the handling of claims against subscribing producers. On October 3, 1988 the ACF was dissolved, and NGC and 21 of its insurers formed the Center for Claims Resolution to carry on the same functions as had the ACF.

Important to the present case is Wellington's broad arbitration clause, which prescribes that "Subscribing Producers and Subscribing Insurers shall resolve through alternative dispute resolution, in the manner set forth in Appendix C hereto, any disputed issues within the scope of the Agreement and the Appendices hereto." Wellington Agreement § VIII ¶ 5. Appendix C of the Wellington Agreement provides for an alternative dispute resolution process ("ADR") of three basic and progressive stages: negotiation, an arbitration proceeding, and an appellate process. Because Wellington applies only to bodily-injury claims, property-damage claims under the same policies are not covered by the arbitration clause.

In December 1986, Stonewall Insurance Company filed an action for declaratory relief against NGC and 37 of its other primary and excess insurers, including U.S. Fire. Stonewall sought a determination of its rights and obligations under policies issued to NGC with respect to asbestos-related property-damage claims against NGC. NGC counterclaimed against Stonewall and cross-claimed against the defendant insurers for a declaration of each non-Wellington insurer's indemnity and defense obligations for all asbestos-related claims and for a declaration of each Wellington insurer's obligations with respect to property-damage claims. NGC also filed a third-party complaint against International and another insurer, seeking a declaration with respect to property-damage claims.

In the course of that litigation, Judge Martin entered a partial declaratory judgment for the insurance companies, including U.S. Fire and International, holding them not liable for defense costs in connection with asbestos-related property-damage claims. *Stonewall Ins. Co. v. National Gypsum Co.*, No. 86 Civ. 9671 (S.D.N.Y. Mar.

22, 1993) ("*Gypsum I*"). Judge Martin also held that the non-Wellington insurers bore no liability for defense costs on bodily-injury claims. On March 30, 1993, partial declaratory judgments were entered that incorporated all prior rulings. NGC appealed on various issues including U.S. Fire's and International's defense obligations for asbestos-related property-damage claims. We affirmed in relevant part in *Stonewall Ins. Co. v. Asbestos Claims Mgt. Corp.*, 73 F.3d 1178 (1995).

On November 2, 1993, NGC initiated an ADR pursuant to Appendix C of the Wellington Agreement seeking payment of the cost of defending bodily-injury claims. NGC contends that this was the earliest date on which it could have initiated an ADR because the policies in question were not accessed under the Wellington formula until September 1993. (A dispute may exist over this conclusion, but it does not affect our disposition of this matter.) Negotiations were unsuccessful. In a letter dated December 23, 1994, NGC notified the Center for Public Resources of its desire to initiate the arbitration proceeding phase of the ADR with respect to the three excess insurance policies at issue in this case. U.S. Fire and International responded by filing an action in the federal court for the District of New Jersey seeking an injunction against further arbitration on the ground that Judge Martin's ruling on property-damage defense costs has a preclusive effect on the issue of U.S. Fire's and International's liability for defense costs relating to bodily-injury claims. NGC cross-moved for an order to compel arbitration pursuant to Section 4 of the FAA, 9 U.S.C. § 4. In February 1995, the case was transferred to the Southern District of New York.

Judge Martin granted the injunction requested by U.S. Fire and International and denied NGC's cross-motion

for an order compelling arbitration. He held that his earlier decision on the question of allocation of defense costs for property-damage claims had issue-preclusive effect on the question of defense obligations for bodily-injury claims. In reaching this decision, he reasoned the issues were identical because the Wellington Agreement—which governs only bodily-injury defense costs—adopted the doctrine of *contra proferentem* that he had applied in his earlier decision relating to various non-Wellington insurance contracts. This appeal by NGC followed.

DISCUSSION

NGC argues that the issue-preclusive effect of the district court's prior decision must itself be arbitrated. In reviewing determinations of the scope of arbitration agreements and denials of orders compelling arbitration, we apply a *de novo* standard of review. *See Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 121 (2d Cir. 1991); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987).

A. *Arbitration of Issue Preclusion*

NGC argues that issue preclusion, like other defenses to arbitrability, is arbitrable, and, because issue preclusion can be arbitrated, it must be arbitrated. We agree.

Our analysis begins with the FAA's strong presumption of arbitrability. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (holding that antitrust trust claims are arbitrable); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985) (holding that securities claims are arbitrable and district court therefore must compel arbitration); *Moses H. Cone*

Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability"). As a result of this presumption, arbitration clauses themselves are to be construed as broadly as possible. *Collins & Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16, 19 (2d Cir. 1995); *David L. Threlkeld & Co. v. Metallgesellschaft, Ltd.*, 923 F.2d 245, 250 (2d Cir.), *cert. dismissed*, 501 U.S. 1267 (1991).

If a party refuses to arbitrate, arbitrability of the dispute hinges only on whether there is an agreement to arbitrate and, if so, whether the dispute falls within that agreement. *See* 9 U.S.C. § 4; *see also National Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 135 (2d Cir. 1996) ("*Belco*"); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, 9 F.3d 1060, 1063 (2d Cir. 1993); *Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 45 (2d Cir. 1993); *Threlkeld*, 923 F.2d at 249; *Conticommodity Servs. v. Philipp & Lion*, 613 F.2d 1222, 1224-25 (2d Cir. 1980).

We hold that the dispute in this case is within the agreement to arbitrate, because in order to reach its conclusion that the issues concerning costs of defense were identical, the district court found it necessary to interpret the Wellington Agreement. It found that

> [t]he arbitrator would interpret the contract language at issue according to the rules of construction set forth in the Wellington Agreement. *See* Wellington Agr. Appendix B, ¶ 4. Specifically, § XI, ¶ 1 of

> Wellington provides: "[U]nless it expressly provides otherwise, each excess insurance policy . . . shall pay allocated expenses [i.e., defense costs]."

In re Arbitration Between National Gypsum Co. and United States Fire Ins. Co., 1995 WL 413278 at *5 (S.D.N.Y. July 13, 1995). The court then found this language to be essentially a restatement of the common law rule of *contra proferentem*—"construction of ambiguous language in an insurance policy against the insurer-drafter—which was applied in *Gypsum I*." *Id.* However obvious this interpretation might seem and whether or not Wellington restates a well-known standard of construction or provides one of its own, the fact is that the district court had to interpret Wellington in order to rule on the question of issue preclusion. At least one facet of the dispute thus requires interpretation of Wellington, plainly a question for the arbitrator rather than for the district court to decide.

Nor is issue preclusion so obscure a question that doubt is cast upon whether the parties intended that it be subject to arbitration. In *First Options of Chicago, Inc. v. Kaplan*, 115 S.Ct. 1920 (1995), the Supreme Court noted that courts should apply a presumption that parties did not agree to arbitrate arbitrability unless there is clear and unmistakable evidence to the contrary. 115 S. Ct. at 1924. But once a court finds that there is an agreement to arbitrate some issues, the presumption switches: ambiguity as to whether an issue is within the scope of an arbitration agreement is resolved in favor of arbitrability. *Id. First Options* involved the issue of whether a court or the arbitrator should decide arbitrability. The Court found the issue of the arbitrability of arbitrability to be so arcane that it inferred that parties who do not express a preference are unlikely to have considered the

issue. Not having considered the issue, the parties would, in the Court's view, likely have assumed that the arbitrator would not resolve that issue because of the principle that parties will be subject to arbitration only on issues they have agreed to arbitrate. *Id.* at 1924-25. In the instant matter, the question of who should decide the issue-preclusive effect of a prior judgment is not so arcane because, unlike the arbitrability of arbitrability, it is not a higher-order question. Further, given a valid arbitration agreement with sweeping language and the courts' well-known tendency to find issues arbitrable, the insurers can hardly claim that their reasonable expectations are defeated.

We find additional support for the arbitrability of issue preclusion from the fact that the defense of issue preclusion is waivable in a second proceeding. *See Sinicropi v. Milone*, 915 F.2d 66 (2d Cir. 1990) (holding that district court must enforce stipulation under which defendant agreed to withdraw defense of collateral estoppel and stipulation had been approved by court and was not manifestly unjust); *see also* 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4405 (1981 & Supp. 1996). If one can agree to waive collateral estoppel without consideration, one can agree to arbitrate the issue as part of a contractual scheme.

Our decision is consistent with our recent holding that the issue-preclusive effect of a prior arbitration is arbitrable and so must be arbitrated. *Belco*, 88 F.3d at 135-36. In *Belco* we rejected the argument that issue preclusion is not related to the merits of an agreement and nonarbitrable, noting that "Belco's claim of preclusion is a legal defense to National Union's claim. As such it is itself a component of the dispute on the merits." *Belco*, 88 F.3d at 135. Although the present case

involves the issue-preclusive effect of a prior judgment, Wellington's arbitration clause covers "any disputed issues within [its] scope." Thus, a defense based on the issue-preclusive effect of the prior judgment is part of the dispute on the merits.

Finally, U.S. Fire and International also argue that, by litigating the issue of property-damage defense costs in *Gypsum I*, NGC has waived its right to arbitrate the allocation of bodily-injury defense costs. As far as the record discloses, the insurers did not make this argument before the district court. Generally, a court of appeals will not consider an issue raised for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994). Nor does this claim present the manifest injustice or the type of purely legal issue that can lead us to disregard the general rule. *Greene*, 13 F.2d at 586. In particular, we note the presence of a factual dispute over the earliest date on which arbitration could have been started. We therefore do not reach the merits of the insurers' waiver argument.

For the foregoing reasons, we reverse the granting of the injunction and order arbitration of the dispute over the allocation of defense costs for bodily-injury claims. The insurers are of course free to raise the defense of issue preclusion before the arbitrator.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 95 Civ. 1152 (JSM)

IN THE MATTER OF THE ARBITRATION BETWEEN NATIONAL GYPSUM COMPANY AND UNITED STATES FIRE INSURANCE COMPANY AND INTERNATINOAL INSURANCE COMPANY,

UNITED STATES FIRE INSURANCE COMPANY AND INTERNATIONAL INSURANCE COMPANY,

Petitioners,

—v.—

NATIONAL GYPSUM COMPANY n/k/a ASBESTOS CLAIMS MANAGEMENT CORPORATION, NGC SETTLEMENT TRUST AND CENTER FOR CLAIMS RESOLUTION,

Respondents.

OPINION AND ORDER

JOHN S. MARTIN, JR., District Judge:

National Gypsum Company ("NGC"), an asbestos manufacturer, is engaged in an insurance coverage dispute with two of its excess liability carriers, the petitioners in this action. Petitioners seek an order barring NGC from submitting that

dispute to an arbitrator. Respondents NGC and NGC Settlement Trust have cross-moved for an order pursuant to § 4 of the Arbitration Act, 9 U.S.C. § 4, compelling petitioners to arbitrate. For the reasons given below, the relief requested by petitioners is granted, and respondents' cross-motion is denied.

BACKGROUND

NGC, United States Fire Insurance Company ("U.S. Fire") and International Insurance Company ("International") were among the many insurers and asbestos producers who signed the Agreement Concerning Asbestos-Related Claims, also known as the Wellington Agreement ("Wellington" or "the Agreement"), in 1985. Wellington was intended to reduce the size of personal injury awards in asbestos litigation, to reduce the costs of defending such litigation, and to minimize bodily injury coverage disputes between asbestos producers and their insurers. To achieve the last of these goals, Wellington established procedures through which signatory producers and insurers could clarify the coverage features of policies into which they had entered, *see* Wellington Agr. Appendix D; persisting coverage disputes between a producer and insurer would be resolved through an Alternative Dispute Resolution proceeding, *id.* § VIII, ¶ 6; *see id.* Appendix C.

Appendix D of Wellington contemplated that, soon after signing the Agreement, an asbestos producer and each of its signatory insurers would agree on a "scheduling" of the coverage features of policies issued by that particular insurer. However, NGC did not agree with U.S. Fire and International as to whether, under three excess liability policies (the "excess policies") which petitioners had previously issued to NGC, *see* Hardin Aff. Exs. N, O, P, petitioners were obligated to pay NGC's defense expenses on bodily injury claims.

A year after NGC signed Wellington, NGC and 37 of its insurers, including U.S. Fire, were named as defendants in an action brought by the Stonewall Insurance Company in this

court, *Stonewall Ins. Co. v. National Gypsum Co., et al.*, No. 86 Civ. 9671 ("*Gypsum I*"). Stonewall sought a declaratory judgment which would set forth its obligations, under liability insurance policies which it had issued to NGC, with regard to asbestos-related property damage claims brought by third parties against NGC. *See* Hardin Aff. Ex. B, Am. Compl. dated January 7, 1986. Upon being named as a defendant, NGC itself sought declaratory relief in the same action: it asked the court to determine the defense and indemnity obligations of several of its insurers, including U.S. Fire and International, on property damage claims. *See id.* Ex. C, NGC's Answer to Am. Compl., Countercl. & Crosscl., Counts I & II; *id.* Ex. D, NGC's Third-Party Compl., Counts I & II.

Among the scores of insurance policies whose coverage features were in dispute in *Gypsum I* were the three excess policies that had been issued by petitioners. On motion, the parties to *Gypsum I* briefed (among many other questions) the question of whether, under the excess policies, U.S. Fire and International owed any obligation to NGC to pay defense expenses incurred by NGC on property damage claims. *See id.* Ex. E at 127-30, 131-32: *id.* Ex. F at 267-84 & Schedule 1, at 3; *id.* Ex. G at 87-89; *id.* Ex. H at 32-33; id. Ex. I at 25-34; *id.* Exs. K & L. This court answered that question in the negative when it issued a declaratory judgment on March 22, 1993. *Stonewall Ins. Co. v. National Gypsum Co., et al.*, No. 86 Civ. 9671, Partial Decl. J. as to Counts I & II of NGC's Am. Countercl. and Crosscls. (S.D.N.Y. March 22, 1993). The court found that the property damage claims that had been filed against NGC by third parties were claims covered by the excess policies, and thus were "sufficient to invoke petitioners' duty, if any, to defend," *id.* ¶ 3; the court also found that the underlying claims were sufficient to invoke the insurers' duty to indemnify, *id.* ¶ 4. However, the court then found that the excess policies imposed no obligation on petitioners "to defend [NGC] or to indemnify or pay on [NGC's] behalf any defense costs on any underlying asbestos property damage claims." *Id.* ¶ 12. The court's declaratory judgment is currently the subject of an appeal to the Second Circuit.

Seven months after entry of this court's judgment in *Gypsum I*, NGC began an ADR pursuant to the procedures set forth the Wellington Agreement. The dispute concerned the extent of petitioners' defense obligations, under the excess policies, for bodily injury claims filed against NGC. *See* Pet'rs' May 19, 1995 Letter to the Ct., Ex. A; Hardin Aff. Ex. Q. As called for by Wellington, U.S. Fire, International and NGC participated in mediation discussions in an effort to resolve their dispute. However, when mediation did not yield a settlement, NGC attempted to begin the next phase of Wellington's ADR process: binding arbitration. U.S. Fire and International refused to participate in the arbitration proceeding, instead filing the present action.

DISCUSSION

Petitioners seek an order permanently enjoining NGC from submitting the parties' current dispute to an arbitrator. They claim that the issue of petitioners' defense obligations under the excess policies was already litigated by the parties in *Gypsum I*, and that NGC is thus precluded from seeking a redetermination of the issue in an arbitration proceeding. NGC, in turn, has cross-moved for an order compelling arbitration of the parties' dispute. It contends that the question of issue preclusion is one properly addressed to an arbitrator, rather than to this court on a motion to stay arbitration. NGC also contends that the doctrine of issue preclusion does not apply in the present case.

For the reasons given below, the court concludes that it can and should resolve the question of issue preclusion raised by the parties, rather than simply compelling arbitration and leaving the issue preclusion question to be resolved by the arbitrator. The court also concludes that NGC is precluded from submitting to an arbitrator the issue of petitioners' defense obligations under the excess policies. Since that issue lies at the crux of the arbitration which NGC currently seeks

to institute, the court finds it appropriate to grant petitioners the relief they seek.

I. *The Proper Forum to Address the Question of Collateral Estoppel*

Before deciding whether collateral estoppel applies in the present case, the court addresses NGC's argument that the question of collateral estoppel itself should be submitted to an arbitrator, rather than being resolved by this court on dueling motions to stay and to compel arbitration. It is true that, ordinarily, a court asked to stay or compel an arbitration proceeding need only determine whether the parties have agreed to arbitrate and, if so, whether the parties' dispute falls within the scope of their arbitration agreement. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218-21, 105 S. Ct. 1241-43 (1985); *Progressive Casualty Ins. Co. v. C.A. Reasegradora Nacional*, 991 F.2d 42, 45 (2d Cir. 1993) (motion to stay proceedings and compel arbitration); *Shearson Lehman Hutton v. Wagoner*, 944 F.2d 114, 121 (2d Cir. 1991) (motion to stay arbitration).[1] Adjudication of an arbitrable claim, and of defenses going to the merits of such a claim, is to be left to the arbitrator. *See, e.g.*, *Wagoner*, 944 F.2d at 121 (court cannot rule on statute of limitations defense to arbitrable claim). Furthermore, given the strong policy in favor of arbitration, any doubts as to the arbitrability of a particular dispute ordinarily should be resolved in favor of arbitration. See *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983).

However, it is widely recognized that when a court is asked to compel (or stay) arbitration, the court can and should determine the preclusive effect of a prior judgment on the arbi-

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[1] When applicable, a court asked to stay arbitration, or to stay proceedings and compel arbitration, must also determine whether (1) whether Congress intended particular federal statutory claims to be nonarbitrable and (2) whether to stay the balance of the proceedings pending arbitration. *Wagoner*, 944 F.2d at 121; *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 844 (2d Cir. 1987).

tration proceeding, rather than simply compelling arbitration and leaving the preclusion question to the arbitrator. *See Kelly v. Merrill, Lynch, Pierce, Fenner & Smith*, 985 F.2d 1067, 1069 (11th Cir.) (res judicata is an issue for the court, not the arbitrator), *cert. denied*, ___ U.S. ___, 114 S. Ct. 600 (1993); *Miller Brewing Co. v. Fort Worth Distributing Co.*, 781 F.2d 494, 499-501 (5th Cir. 1986) (same); *Telephone Workers' Union v. New Jersey Bell Telephone*, 584 F.2d 31, 33 (3rd Cir. 1978) (collateral estoppel); *Sprague & Rhodes Commodity Corp. v. Instituto Mexicano Del Cafe*, 566 F.2d 861, 862-63 (2d Cir. 1977) (res judicata); *Ank Shipping Co. v. Seychelles Nat'l Commodity Co.*, 596 F. Supp. 1455, 1458-59 (S.D.N.Y. 1984) (interpreting and applying *Sprague & Rhodes*). Although most of the cases just cited involve res judicata, the collateral estoppel doctrine also plays a key role in preserving the integrity of judgments and in promoting efficiency in litigation. *See Miller Brewing Co.*, 781 F.2d at 497 n.3 ("The doctrine of res judicata . . . and its cousin collateral estoppel have probably done more to prevent useless and wasteful litigation than arbitration ever could."). Thus claim preclusion and issue preclusion are both distinguishable from other defenses to arbitrability which a party to an arbitration might raise; and both present questions properly determined by the district court on a motion to compel or stay an arbitration proceeding.

Although Wellington contains a broad arbitration clause, Wellington Agr. § VIII, ¶ 6, this court would be remiss in its obligation to protect the declaratory judgment entered by it in 1993, and to discourage wasteful litigation, if it compelled the parties to arbitrate claims which turned on an issue already decided in *Gypsum I*. Accordingly, in order to decide whether to stay or compel arbitration between the parties, the court must first determine whether NGC is collaterally estopped from raising, in that arbitration, the issue of petitioners' defense obligations under the excess policies.

II. *Collateral Estoppel*

The doctrine of collateral estoppel bars relitigation of an issue that was "actually and necessarily determined by a court of competent jurisdiction . . . in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 973 (1979). Collateral estoppel applies if "(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits." *In re PCH Associates*, 949 F.2d 585, 593 (2d Cir. 1991); *see also Metromedia Co. v. Fugazy*, 983 F.2d 350, 365 (2d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2445 (1993).

A. *Identity of Issues*

It is obvious that the *claim* adjudicated by this court in *Gypsum I* is different from the *claim* which NGC now seeks to bring before an arbitrator: this court decided whether, under the excess policies, petitioners owed a defense obligation to NGC on property damage claims; and an arbitrator would now decide whether, under the excess policies, petitioners owe a defense obligation to NGC on bodily injury claims. However, the resolution of both of NGC's claims, old and new, hinges on exactly the same *issue*: the extent of petitioners' defense obligations under the policies. Notably, none of the policies draw any distinction between bodily injury and property damage claims when defining petitioners' defense obligations; instead, each policy contains specific language pertaining to petitioners' defense obligations on *all* covered claims, whether the claims are for injury to person or to property. It is precisely this contractual language in the excess policies which was interpreted in *Gypsum I*, and which an arbitrator would have to interpret in order to resolve the parties' current

dispute. In other words, the arbitrator would be squarely faced with an issue—an issue dispositive of the parties' current dispute—that was identical to the issue resolved in *Gypsum I*.

Respondent argues that even though an arbitrator would construe exactly the same policy language as I construed in *Gypsum I*, the "issue" to be decided by the arbitrator would be different because different rules of construction would apply when interpreting that language. It is true that, even though seemingly similar issues may be presented for decision in two consecutive proceedings, the issues are not "identical" for preclusion purposes if the legal standards governing their resolution are significantly different. *Metromedia Co. v. Fugazy*, 983 F.2d 350, 365 (2d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2445 (1993); *Jim Beam Brands Co. v. Beamish & Crawford Ltd.*, 937 F.2d 729, 734 (2d Cir. 1991), *cert. denied*, 502 U.S. 1094, 112 S. Ct. 1169 (1992). However, there is no significant difference, and indeed no real difference at all, between the standard to be applied by the arbitrator and the standard applied by this court in *Gypsum I*.

The arbitrator would interpret the contract language at issue according to the rules of construction set forth in the Wellington Agreement. *See* Wellington Agr. Appendix B, ¶ 4. Specifically, § XI, ¶ 1 of Wellington provides: "[U]nless it expressly provides otherwise, each excess insurance policy . . . shall pay allocated expenses [*i.e.*, defense costs]." This is essentially a restatement of the commonlaw rule of *contra proferentum*—construction of ambiguous language in an insurance policy against the insurer-drafter—which was applied in *Gypsum* I. In that action, construction of the excess policies was controlled by Texas law, *see Stonewall Ins. Co. v. Nat'l Gypsum Co., et al.*, No. 86 Civ. 9671, slip op. at 7-12 (S.D.N.Y. May 26, 1992); *Stonewall Ins. Co. v. National Gypsum Co., et al.*, No. 86 Civ. 9671, Partial Decl. J. as to Counts I & II of NGC's Am. Countercl. and Cross-cls, ¶¶ 1-2 (S.D.N.Y. March 22, 1993); and like the courts of virtually every other state, Texas' courts have long construed insurance policy language in a manner favoring coverage, *see Barnett v.*

Aetna Life Ins. Co., 723 S.W.2d 663, 666 (Tex. 1987), and accordingly have resolved all ambiguities against the insurer, *see Stonewall*, 86 Civ. 9671, slip op. at 11 (S.D.N.Y. May 26, 1992), *citing Brooks, Tarlton, Gilbert, Douglas & Kressler v. U.S. Fire Ins. Co.*, 832 F.2d 1358, 1365 (5th Cir. 1987); *accord Nat'l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991). These rules of construction have been applied with especial force by Texas' courts where an exclusionary clause or exception or limitation to liability is involved. *See Barnett*, 723 S.W.2d at 666.[2]

The conclusion that § XI, ¶ 1 of Wellington essentially restates the common law of Texas is buttressed by the Third Circuit's recent decision in *North River Ins. Co. v. CTGNA Reins. Co.*, 1995 WL 215844 (3rd Cir. 1995). North River was an excess liability carrier which—like U.S. Fire and International had issued policies to an asbestos producer, and subsequently had signed the Wellington Agreement. The court concluded that, when North River signed Wellington, it did not expand its defense obligations under the policies, at least as the policies could reasonably have been construed under Ohio law (the law which would have governed construction of the policies before National River signed Wellington). *See id.* at *15, *17-*18. In reaching this conclusion, the *North River* court compared the commonlaw rules applied by Ohio's courts with the presumption of coverage established by § XI, ¶ 1 of Wellington, and found that the former did not differ significantly from the latter: "Under Ohio law, the standard for

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[2] Counsel for NGC suggested at oral argument that it is not clear whether, in *Gypsum I*, I actually applied a *contra proferentum* standard when deciding the defense obligation issue. However, the transcript of the hearing during which I spoke to this issue from the bench makes the logic behind my ruling clear, at least insofar as the two U.S. Fire excess policies are concerned: the unambiguous language of the policies relieved petitioners from any obligation to pay defense costs. *See* Hardin Aff. Ex. L, Tr. of Proceedings Dated June 15, 1992, at 71-73; *Stonewall Ins. Co. v. National Gypsum Co., et al.*, No. 86 Civ. 9671, Partial Decl. J. as to Counts I & II of NGC's Am. Countercl. and Cross-cls., ¶ 12 (S.D.N.Y. March 22, 1993).

establishing an exclusion from coverage is substantially the same as that provided by Wellington: 'An exclusion must be stated clearly in explicit wording setting forth with specificity exactly what is to be excluded.' " *Id.* at *15 (*quoting River Servs. Co. v. Hartford Accident & Indem. Co.*, 449 F. Supp. 622, 626 (N.D. Ohio 1977) (applying Ohio law)). The parallel to the present litigation could not be clearer, and the Third Circuit's reasoning stands in direct contradiction to the "different standards" argument advanced by NGC.

In sum, the defense obligation issue decided by it in *Gypsum I* is indistinguishable from the defense obligation issue which NGC now seeks to arbitrate.

B. *The Other Elements Required for Collateral Estoppel*

Turning briefly to the remaining prerequisites for collateral estoppel, it is clear that these requirements have been met. NGC raised the issue of petitioners' defense obligations under the excess policies in the first lawsuit, had every incentive to litigate the issue fully in that action, and—as the briefing of the defense obligation issue by the parties makes clear—in fact did so. Accordingly, there can be no question as to whether NGC had a "full and fair opportunity to litigate" the defense obligation issue in *Gypsum I*.[3] Furthermore, this court's March 22, 1993 declaratory judgment was indisputably a "valid and final judgment on the merits" which "actually and necessarily decided" the issue.

Accordingly, NGC is collaterally estopped from raising the defense obligation issue anew in an arbitration proceeding.

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[3] NGC's argument that it has not had a fair opportunity to litigate because "the issue of petitioners' defense obligations *for bodily injury claims* was not before this court for resolution," Resp't's Br. at 18 (emphasis added), completely misses the point made above in Section A: whether petitioners owe a defense obligation to NGC does not depend, in any way, on the type of claim asserted against NGC by a third party.

III. *Relief*

The All Writs Act, 28 U.S.C. § 1651, gives federal courts the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." That power can properly be used to enjoin an arbitration proceeding in which matters previously adjudicated by a federal court would be relitigated. *See, e.g., In re Y & A Group Securities Litigation,* 38 F.3d 380, 382-83 (8th Cir. 1994); *Kelly v. Merrill, Lynch, Pierce, Fenner & Smith,* 985 F.2d 1067, 1069 (11th Cir.), *cert. denied,* ___ U.S. ___, 114 S. Ct. 600 (1993); *see also In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985) (All Writs Act permits district court to enjoin state-court actions "where necessary to prevent relitigation of an existing federal judgment"); *Redac Project 6426, Inc. v. Allstate Ins. Co.*, 412 F.2d 1043, 1047-48 (2d Cir. 1969) (district court properly enjoined plaintiffs from filing suits related to federal action in which judgment had been entered, notwithstanding the fact that "[defendant's] judgment on the merits in plaintiffs' [prior federal] action might make available defenses of res judicata or collateral estoppel in any future suits plaintiffs might bring against [defendant].")

As discussed above, the defense obligation issue decided in *Gypsum I* is dispositive of the dispute which NGC now seeks to arbitrate. The finality and binding effect of the declaratory judgment entered in the prior action would be entirely illusory if this court now allowed the arbitration to go forward. The court can find absolutely no reason to subject petitioners to the time, expense, and uncertainty that would be involved in relitigating the defense obligation issue in a new forum. Accordingly, the court permanently enjoins NGC from proceeding with the arbitration proceeding initiated against U.S. Fire and International.

SO ORDERED.

Dated: New York, New York
July 12, 1995

/s/ JOHN S. MARTIN, JR.
JOHN S. MARTIN, JR., U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 95 CIVIL 1152(JSM)
Filed July 18, 1995

IN THE MATTER OF THE ARBITRATION BETWEEN NATIONAL GYPSUM COMPANY AND UNITED STATES FIRE INSURANCE COMPANY,

UNITED STATES FIRE INSURANCE COMPANY AND INTERNATIONAL INSURANCE COMPANY,

Petitioners,

—v—

NATIONAL GYPSUM COMPANY n/k/a ASBESTOS CLAIMS MANAGEMENT CORPORATION, NGC SETTLEMENT TRUST AND CENTER FOR CLAIMS RESOLUTION,

Respondents,

JUDGMENT

Petitioners having moved for an order barring NGC from submitting an insurance coverage dispute to an arbitrator and Respondents having cross-moved for an order pursuant to Sect. 4 of the Arbitration Act, 9 U.S.C. Sect. 4, compelling petitioners to arbitrate and the said motions having come

before the Honorable JOHN S. MARTIN, U.S.D.J., and the Court thereafter on July 12, 1995 having handed down its memorandum opinion (75081) and order granting the relief requested by petitioners and denying respondents' cross-motion, it is,

ORDERED, ADJUDGED AND DECREED: That petitioners motion to bar NGC from submitting an insurance coverage dispute to an arbitrator is granted and respondents' cross-motion is denied, and it is further,

ORDERED, that NGC is permanently enjoined from proceeding with the arbitration proceeding initiated against U.S. Fire Insurance Company and International Insurance Company.

DATED: NEW YORK, NEW YORK
July 18, 1995

/s/ [ILLEGIBLE]
Clerk

By: /s/ [ILLEGIBLE]
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dkt. No: 95-7806
Filed: January 30, 1997

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 30th day of January one thousand nine hundred and ninety-seven.

U.S. FIRE INSURANCE,

v

NATIONAL GYPSUM CO.,

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee's United States Fire Insurance Company and International Insurance Company.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular

active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk

By: /s/ ARTHUR M. HELLER
Arthur M. Heller
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 95-7806
Filed November 5, 1996

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fifth day of November, one thousand nine hundred and ninety-six,

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PRESENT: Hon. Ralph K. Winter,
Hon. Pierre N. Leval,
Circuit Judges
Hon. Alvin W. Thompson,
*District Judge**

UNITED STATES FIRE INSURANCE CO.;
INTERNATIONAL INSURANCE COMPANY,

Plaintiffs-Appellees,

—v.—

NATIONAL GYPSUM CO., n/k/a Asbestos Claims Management Corporation; NGC SETTLEMENT TRUST,

Defendants-Appellants,

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* The Hon. Alvin W. Thompson, judge of the United States District Court for the District of Connecticut, sitting by designation.

CENTER FOR CLAIMS RESOLUTION,

Defendant.

MANDATE

Appeal from an injunction against arbitration issued by the United States District Court for the Southern District of New York.

This matter came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

Upon consideration thereof, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that said injunction be, and it hereby is, REVERSED. IT IS FURTHER ORDERED and that matters in dispute be arbitrated in accordance with the opinion of this Court.

FOR THE COURT:
GEORGE LANGE III, CLERK

by: /s/ BETH J. MEADOR
Beth J. Meador, Administrative Attorney

ISSUED AS MANDATE
February 25, 1997

[ADDRESS OF UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY]

REPLY TO: TRENTON

James M. Parkison, Clerk
United States District Court
Southern District of New York
Foley Square
New York, N.Y. 10007

RE: U.S. FIRE INSURANCE COL, et al v. NATIONAL GYPSUM CO., et al Cv. 95-32(MLP)

Dear Mr. Parkison:

Enclosed please find the file in the above captioned matter which was transferred to your district pursuant to an order of the Honorable Mary Little Parell filed on 2/2/95, a certified copy of which is enclosed. Also enclosed is a certified copy of the docket entries in this district.

Kindly acknowledge receipt of the above on the enclosed copy of this letter and return in the envelope provided. Thank you for your anticipated cooperation.

Sincerely,

WILLIAM T. WALSH, CLERK

/s/ LILLIAN A. KRZYZANOWSKI
BY: Lillian A. Krzyzanowski
Deputy Clerk

cc: All Counsel of Record
File

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 95-32(MLP)
ORIGINAL FILED: February 2, 1995
William T. Walsh, Clerk

IN THE MATTER OF THE ARBITRATION BETWEEN NATIONAL GYPSUM COMPANY AND UNITED STATES FIRE INSURANCE COMPANY AND INTERNATIONAL INSURANCE COMPANY,

UNITED STATES FIRE INSURANCE COMPANY AND INTERNATIONAL INSURANCE COMPANY,

Plaintiffs,

—and—

NATIONAL GYPSUM COMPANY n/k/a ASBESTOS CLAIMS MANAGEMENT CORPORATION, NGC SETTLEMENT TRUST AND CENTER FOR CLAIMS RESOLUTION,

Defendants.

MEMORANDUM AND ORDER

PARELL, District Judge

This matter comes before the Court on its *sua sponte* Order that petitioners, the United States Fire Insurance Company ("U.S. Fire") and International Insurance Company ("Inter-

national"), Show Cause why this action should not be transferred to the United States District Court for the Southern District of New York. The only defendant responding at this stage of the proceeding is National Gypsum Company n/k/a Asbestos Claims Management Corporation ("Gypsum"). The parties having briefed this issue, and the Court having heard oral argument on January 25, 1994, shall order that this action be transferred to the United States District Court for the Southern District of New York, with a recommendation that this action be assigned to the Honorable Judge John S. Martin, before whom these same parties have pending matters closely related to this litigation.

FACTUAL BACKGROUND[1]

Gypsum and its insurers, including U.S. Fire and International, have been in an insurance coverage dispute as to whether certain policies issued by U.S. Fire and International to Gypsum obligate the insurers to pay Gypsum's defense related costs for certain asbestos-related claims. (Petitioners' January 10, 1994 Memorandum [Pets.' 1/10/94 Memo.] at 3-4.) The parties appear to agree that this dispute raises issues under a 1985 contract (the "Wellington Agreement") signed by the parties (and Gysum's other primary and excess insurers). (*Id.*) The Wellington Agreement was designed to provide for the administration of various issues surrounding bodily injury asbestos-related claims. (*Id.*) The Wellington Agreement also provided for coverage disputes to be resolved through an Alternate Dispute Resolution procedure outlined therein. (Ex. A. to Hardin Aff., Wellington Agreement, Sec. VII at ¶6 & Appendix C.)

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[1] The facts of the underlying litigation in this matter are extensive and are more fully recounted in, among other places, the March 23, 1993 opinion of United States District Judge J. Martin which granted plaintiffs' Partial Declaratory Judgment in this matter. For present purposes, it is only necessary to outline the facts leading up to plaintiffs' original application before this Court for an Order to Show Cause and for injunctive relief.

In 1986, one of Gypsum's insurers, Stonewall Insurance Company ("Stonewall"), filed a Declaratory Judgment action in the United States District Court for the Southern District of New York, *Stonewall Insurance Company v. National Gypsum Company. et al.*, 86-9671, seeking a determination of the rights and obligations of Stonewall for certain liability claims filed against Gypsum. (Ex. B. to Hardin Aff.) Gypsum cross-claimed against U.S. Fire and others, seeking a declaration of the defense and indemnity obligations of each of Gypsum's insurers. (Ex. C. to Hardin Aff.) Gypsum also filed a Third-Party Complaint against International, also seeking a determination as to the obligations of International to defend and indemnify Gypsum. (Ex. D. to Hardin Aff.) As a result, it appears that the District Court for the Southern District of New York was asked to declare the legal obligations of U.S. Fire and International to defend and indemnify Gypsum for the underlying asbestos-related claims filed against Gypsum.

Following extensive briefing, United States District Judge John S. Martin ruled that: (l) the claims asserted against Gypsum in the underlying asbestos litigation were claims for "property damage" within the meaning of the policies issued by U.S. Fire and International "sufficient to invoke the insurer's duty, if any, to defend" (Ex. M. ¶3.); (2) the underlying asbestos claims against Gypsum were also property damage claims for purposes of invoking the insurers' duty, if any, to indemnify (*Id.* ¶4.). However, Judge Martin ruled that: (3) the particular policies issued by U.S. Fire and International created no contractual duty "to defend Gypsum or to indemnify or to pay on Gypsum's behalf any defense costs on any underlying asbestos property damage claim." (*Id.* ¶12.)[2]

Notwithstanding Judge Martin's ruling that neither insurer was obligated to defend Gypsum, both insurers engaged in mediation discussions with Gypsum pursuant to the Wellington Agreement. The parties, however, made clear in a signed

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[2] Judge Martin certified these issues for interlocutory appeal to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. 1292(b), which appeal is currently pending. (See Ex. M. ¶12.)

Agreement, dated January 13, 1994, that the mediation discussions did not waive any rights to claim subsequently that ADR was barred as a matter of law in accordance with the *Stonewall* decision. (Ex. Q. to Hardin Aff. at 3.) The Negotiation phase of the ADR proved unsuccessful and Gypsum, by letter dated December 23, 1994, sought to move the mediation into the Proceeding (trial) phase of the ADR.

PROCEDURAL BACKGROUND

On January 10, 1994, petitioners U.S. Fire and International filed with this Court a verified petition seeking an Order to Show Cause and a preliminary and permanent injunction enjoining the arbitration between Gypsum and U.S. Fire and International.[3] In addition to Gypsum, petitioners also named the Center for Claims Resolution ("CCR") as a respondent in this action. CCR is a Delaware Corporation with its principal place of business in Princeton, New Jersey. CCR is a claims processing facility which administers Gypsum's and other subscribing manufacturers' asbestos-related bodily injury claims. CCR functions by assessing to each manufacturer a fixed percentage of the cost of every valid bodily injury claim. These costs are then paid by each manufacturer's insurer in accordance with the manufacturer's insurance coverage. Thus, although CCR bills the insurers based on the costs of a particular claim, it does so in accordance with a formula agreed upon by the asbestos manufacturers who created CCR. CCR was not a party to the *Stonewall* litigation in New York, and has been joined by petitioners in the instant action because it "invoices U.S. Fire and International for payment of indemnity, settlement and defense costs associated with those [asbestos-related bodily injury] claims. No relief is sought from CCR other than to bind it to the final determination of this Court." (Pets.' 1/10/94 Memo. at 2.)

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[3] Respondent Gypsum has objected to the adequacy of petitioner's moving papers.

In response, and in recognition of the fact that petitioners' requests were related to a complex and multifaceted litigation currently pending before United States District Judge John S. Martin in the Southern District of New York and the United States Court of Appeals for the Second Circuit, this Court *sua sponte* issued an Order to Show Cause returnable January 25, 1995. The Court's Order to Show Cause was exclusively addressed to the issue of why this action should not be transferred to the venue of the Southern District of New York.

During the January 25, 1995, Order to Show Cause hearing, petitioners argued that their choice of the District of New Jersey as the proper venue for this action should be honored because: (1) New Jersey is the only forum which can ensure jurisdiction over all the parties, including respondent CCR, over whom personal jurisdiction in the Southern District of New York would be "questionable"; (2) any transfer might jeopardize petitioners' effort to enjoin the arbitration because the ADR timetable is "aggressive"; (3) transfer is unnecessary because this Court is equally capable of assessing the merits of petitioners' collateral estoppel argument; and (4) transfer of this action is not "in the interests of justice." (Petitioners' 1/25/95 Memorandum of Law In Support of Petitioners' Choice of Venue.)

Respondent Gypsum argued that: (1) CCR is not a party to the dispute between Gypsum and its insurers, is entirely unnecessary to this litigation, has no legal interest in the outcome of the coverage dispute, and CCR's nondiscretionary role in invoicing designated insurers does not require its inclusion in this or any other related dispute between the parties; (2) because the ADR has been effectively halted by petitioners' filing of this action, there is no potential prejudice to petitioners by transferring this matter to New York; (3) petitioners' claim that they will not be assured of jurisdiction over CCR is undercut by the clear recognition that CCR is unnecessary to the resolution of this matter; and (4) due to the pendency of the *Stonewall* litigation in the Southern District of new York, the factors of convenience and judicial economy

weigh heavily in favor of transfer. (Respondents' 1/25/95 Memorandum of Law in Support of Transfer[4], 13-38.)

DISCUSSION

Upon consideration of the parties' submissions and after conducting oral argument on this matter, this Court finds that transfer of this matter to the United States District Court for Southern District of New York pursuant to 28 U.S.C. 1404, is warranted. Section 1404(a) permits a transfer of venue from one district to another "for the convenience of parties and witnesses" and "in the interest of justice." *Id.* In the instant case, considerations of judicial economy and the interest of justice weigh in favor of transfer. "[W]here related lawsuits exist, it is in the interest of justice to permit suits involving the same parties and issues to proceed before one court and not simultaneously before two tribunals." *Ricoh Co., Ltd. v. Honeywell, Inc.*, 817 F. Supp. 473, 480 (D. N.J. 1993) (internal quotation marks and citation omitted). These same parties are presently involved in complex litigation, the *Stonewall* case, out of which the present matter arose. Therefore, the interests of justice and judicial economy weigh in favor of transferring this matter to the venue where the related *Stonewall* litigation is pending.

In addition, the Court finds petitioners' argument that it could not be assured of jurisdiction over CCR in the transferee district unpersuasive. This Court is not convinced that CCR is in any way necessary to the resolution of the underlying dispute between Gypsum and U.S. Fire and International. It appears to the Court at this point that CCR's

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[4] Respondents' Memorandum also argues for dismissal of this action on the basis of several procedural deficiencies. (Resps.' Memo. at 10-13.) For purposes of the motion to transfer only, and without making any determination as to the adequacy of the petition, the Court assumed the sufficiency of the "complaint" filed by U.S. Fire and International. This issue, among others, is left to the disposition of the Judge in the Southern District of New York to whom this matter is assigned.

ministerial role in invoicing the petitioners does not thereby require its inclusion as a potential defendant in this case.[5] Thus, the Court is satisfied that transfer of this matter will not result in prejudice to petitioners.[6] For the foregoing reasons, the transfer shall be ordered.

IT IS on this 2nd day of February, 1995 ORDERED that, pursuant to 28 U.S.C. § 1404, this matter, including all matters herein, be TRANSFERRED to the United States District Court for the Southern District of New York, with the recommendation that this matter be assigned to the Honorable John S. Martin.

/s/ MARY LITTLE PARELL
MARY LITTLE PARELL
United States District Judge

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[5] Respondent Gypsum has submitted an Affidavit by Lawrence Fitzpatrick, President of CCR, that CCR has no legal interest in the underlying dispute between petitioners and Gypsum. (Fitzpatrick Aff. ¶4.)

[6] Nor does transfer of this matter appear to result in any serious difficulty with jurisdiction over CCR in the New York venue. As petitioner conceded in oral argument, CCR administers claims for asbestos-related bodily injury claims throughout the country, including New York. Therefore, even were CCR a necessary party, it does not appear that *in personam* jurisdiction over CCR in New York would be foreclosed. On the other hand, should this matter remain in the venue of the District of New Jersey, there would seem to be a substantial question whether petitioners would have jurisdiction over Gypsum, which is a trust doing no business in New Jersey.

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f/k/a National Gypsum Company, and the
NGC Settlement Trust

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95 Civ. 1152 (JSM)

IN THE MATTER OF THE ARBITRATION BETWEEN NATIONAL GYPSUM COMPANY AND UNITED STATES FIRE INSURANCE COMPANY AND INTERNATIONAL INSURANCE COMPANY,

UNITED STATES FIRE INSURANCE COMPANY AND INTERNATIONAL INSURANCE COMPANY,

Petitioners,

—vs—

NATIONAL GYPSUM COMPANY, n/k/a ASBESTOS CLAIMS MANAGEMENT CORPORATION, NGC SETTLEMENT TRUST AND CENTER FOR CLAIMS RESOLUTION,

Respondents.

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Notice is hereby given that Asbestos Claims Management Corporation, f/k/a National Gypsum Company, and the NGC Settlement Trust, two of the Respondents in the above captioned action, hereby appeal to the United States Court of Appeals for the Second Circuit from the Opinion and Order handed down on July 12, 1995 and the judgment entered on July 19, 1995, permanently enjoining National Gypsum Company from initiating alternative dispute resolution to determine whether certain policies issued by U.S. Fire Insurance Company and International Insurance Company require the insurers to pay National Gypsum Company's defense costs for asbestos bodily injury claims and denying Respondent's cross-motion to compel such alternative dispute resolution.

Dated: August 11, 1995

Respectfully submitted,

KIRKPATRICK & LOCKHART

/s/ EUGENE R. LICKER, ESQ.

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STATUTES INVOLVED

SUPREME COURT – JURISDICTION

28 § 1254

§ 1254. Courts of appeals; certiorari, certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, 62 Stat. 928; June 27, 1988, Pub.L. 100-352, § 2(a), (b), 102 Stat. 662.)

ALL WRITS ACT

28 U.S.C. § 1651

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.)

FEDERAL ARBITRATION ACT

ARBITRATION
9 U.S.C. §§ 1 to 14

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

July 30, 1947, c. 392, 61 Stat. 670.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising our of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 State. 670.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 392, 61 Stat. 670.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the

arbitration agreement or the failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceedings shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.

§ 5. Appointment of arbitration or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided an any party thereto shall fail to avail himself of such method, of if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise

provided in the agreement the arbitration shall be by a single arbitrator.

July 30, 1947, c. 392, 61 Stat. 671.

§ 6. Application hear as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

July 30, 1947, c. 392, 61 Stat. 671.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before master of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them and shall, be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

July 30, 1947, c. 392, 61 Stat. 672; Oct. 31, 1951, c. 655, § 14, 65 Stat. 715.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

July 30, 1947, c. 392, 61 Stat. 672.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshall of any district within which the

adverse party may be found in like manner as other process of the court.

July 30, 1947, c. 392, 61 Stat. 672.

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

July 30, 1947, c. 392, 61 Stat. 672.

§ 11. Same; modification or correction; grounds; orders

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

July 30, 1947, c. 392, 61 Stat. 673.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

July 30, 1947, c. 392, 61 Stat. 673.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk;

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

July 30, 1947, c. 392, 61 Stat. 673.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

July 30, 1947, c. 392, 61 Stat. 673.

AGREEMENT CONCERNING ASBESTOS-RELATED CLAIMS

June 19, 1985

AGREEMENT CONCERNING ASBESTOS-RELATED CLAIMS

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AGREEMENT CONCERNING ASBESTOS-RELATED CLAIMS

This Agreement to provide for the administration, defense, payment and disposition of asbestos-related claims (hereinbelow referred to as the "Agreement") is made between and among Subscribing Producers, as defined hereinbelow, and the Subscribing Insurers, as defined hereinbelow.

WITNESSETH:

WHEREAS, Subscribing Producers and Subscribing Insurers have considered the nature of asbestos-related claims, their number and widespread distribution throughout the United States, the various rules of law governing their resolution, the scope and complexity of the insurance arrangements related thereto, and the burden that such claims have placed on the American civil justice system; and

WHEREAS, Subscribing Producers and Subscribing Insurers recognize the existence of numerous insurance coverage disputes between and among Insurers and Producers, differing court decisions, and the existence of cross-actions among Producers and among Insurers; and

WHEREAS, Subscribing Producers and Subscribing Insurers desire to simplify the procedures for handling claims, reduce the costs of such procedures, apply insurance arrangements in a consistent manner and take other steps reasonable and practical to ensure the expenditure of funds for the reasonable payment of meritorious claims at reasonable processing costs; and

WHEREAS, Subscribing Producers and Subscribing Insurers desire to resolve and discontinue the various disputes concerning insurance coverage for asbestos-related claims and to embark upon a method for resolution of asbestos-related claims and the insurance arrangements pertaining thereto;

NOW THEREFORE, in consideration of the mutual covenants herein contained and intending to be legally bound hereby, the Subscribing Producers and Subscribing Insurers hereby agree as follows:

I. GENERAL CONDITIONS

1. Any Producer or Insurer may become a signatory to the Agreement on or before June 19, 1985, and in so doing shall agree to be bound by the terms and conditions of the Agreement and the Appendices hereto, and prior to said date shall offer participation in the Agreement to each and every of its Producers or Insurers, as the case may be. If a Producer or Insurer does not become a signatory hereto on or before June 19, 1985, but subsequently wants to become a signatory as a result of changed circumstances, participation in the Agreement by such Producer or Insurer may be in conflict with the fixed commitments and compromises upon the basis of which other Producers and Insurers will have entered into the Agreement on or before June 19, 1985. Participation in the Agreement by additional proposed signatories therefore shall be considered only in accordance with Section XXI hereinbelow.

2. The Agreement is intended to apply solely to asbestos-related claims as defined hereinbelow. It is the product of informed negotiations among the signatories hereto, involving compromises of previously stated legal positions. The Agreement does not necessarily reflect the views of Subscribing Producers and Subscribing Insurers as to their rights and obligations with regard to matters or persons outside of the scope of the Agreement, and with respect to all such matters or persons, all signatories reserve all previously held positions and all other rights and privileges.

3. The Agreement is intended to confer rights and benefits only upon Subscribing Producers and Subscribing Insurers, and is not intended to confer any rights or benefits upon persons not signatories to the Agreement. No person other than a signatory hereto shall have any legally enforceable rights

under the Agreement. All rights of action for any breach of this Agreement by any signatory hereto are hereby reserved to Subscribing Producers and Subscribing Insurers.

4. All actions taken and statements made by persons or their representatives relating to their participation in the Agreement including its development and implementation, shall be without prejudice or value as precedents, and shall not be taken as a standard by which other matters may be judged.

5. All persons subscribing to or otherwise associating themselves with the Agreement request all Courts to take notice of its underlying purpose, and to accord all persons subscribing to or otherwise associating themselves with the Agreement and their representatives full privilege and protection with respect to the disclosure of their actions, statements, documents, papers and other materials relating to the Agreement, including its development and implementation.

II. ESTABLISHMENT OF FACILITY

1. Subscribing Producers and Subscribing Insurers shall establish a non-profit organization to be known as the Asbestos Claims Facility (hereinafter referred to as the "Facility"). The Facility shall administer and arrange for the evaluation, settlement, payment or defense of all asbestos-related claims against Subscribing Producers and Subscribing Insurers in accordance with the provisions of the Agreement and Appendix A hereto, and pursuant to the provisions of law and professional standards applicable to Subscribing Insurers.

2. The Facility shall be governed by a Board of Directors whose members shall number at least 12 and whose members shall contain an equal number of representatives of Subscribing Producer members and of Subscribing Insurer members. The Board of Directors shall have power to increase the number of directors and to add public directors, to appoint such officers, employees and committees of persons as the

Board sees fit, to define their authorities and responsibilities and to set the conditions of their appointments. The Board of Directors shall have no power to modify any provisions of the Agreement or of the Appendices hereto.

3. The Facility shall not sell, lease, exchange, mortgage, pledge, or otherwise dispose of all or substantially all of its property or assets and shall not dissolve or wind up its affairs except upon the affirmative vote of two-thirds of Subscribing Producer members with two-thirds interest or two-thirds of Subscriber Insurer members with two-thirds interest.

III. MEMBERSHIP IN FACILITY

1. Subject to the provisions of Section XXI hereinbelow, each Producer and each Insurer shall become a member of the Facility upon becoming a signatory to the Agreement and shall invite each of its Producers or Insurers, as the case may be, to become a signatory to the Agreement and thereby to become a member of the Facility.

2. Voting rights of members and voting procedures shall be determined respectively by Subscribing Producers and Subscribing Insurers.

3. Neither the Board of Directors nor any other persons shall have any authority to terminate the membership of a member without the consent of such member; *provided*, that membership in the Facility shall terminate at such time as a member no longer has an obligation to make payments or to pay expenses pursuant to the Agreement and the Appendices hereto. A member may terminate its membership in the Facility at any time upon written notice to the Facility, but, except as otherwise explicitly provided herein, termination of membership shall not modify the rights and obligations of a Subscribing Producer, Subscribing Insurer or the Facility under the Agreement and the Appendices hereto.

IV. SUBMISSION AND WITHDRAWAL OF CLAIMS

1. By becoming a signatory to the Agreement, each Subscribing Producer and each Subscribing Insurer designates the Facility as its sole agent to administer and arrange on its behalf for the evaluation, settlement, payment or defense of all asbestos-related claims against such Subscribing Producer or Subscribing Insurer. As sole agent, the Facility shall have exclusive authority and discretion to administer, evaluate, settle, pay or defend all asbestos-related claims. Except as otherwise provided in Paragraph 2 hereinbelow, the Facility shall serve perpetually as the sole agent of each Subscribing Producer and each Subscribing Insurer with respect to all asbestos-related claims.

2. Any Subscribing Producer or Subscribing Insurer may withdraw the designation of the Facility as its sole agent made pursuant to Paragraph I hereinabove, and may terminate the Facility's right and authority to act on behalf of such Subscribing Producer or Subscribing Insurer by providing written notice to the Facility 60 days prior to the effective date of such withdrawal; *provided,* that such withdrawal shall apply only to asbestos-related claims filed or made against the withdrawing Subscribing Producer or Subscribing Insurer subsequent to the effective date of withdrawal. The Facility shall continue to serve as sole agent for such Subscribing Producer or Subscribing Insurer with respect to all asbestos-related claims filed on or before the effective date of withdrawal.

V. COOPERATION WITH FACILITY

Each Subscribing Producer and each Subscribing Insurer shall comply with the terms and conditions of the Agreement and the Appendices hereto, and shall cooperate with and assist the Facility in furtherance of such terms and conditions. Each Subscribing Producer and each Subscribing Insurer shall respond fully and in a timely manner to reasonable requests by the Facility for information and shall assist in the securing and giving of evidence concerning asbestos-related claims.

To the extent practicable, the Facility shall maintain the confidentiality of confidential or proprietary information submitted by Subscribing Producers and Subscribing Insurers.

VI. ALLOCATION OF LIABILITIES AND EXPENSES

1. Liability payments and allocated expenses shall be allocated to each Subscribing Producer on the date such Producer becomes a signatory to the Agreement. Such allocation shall establish the responsibility of each Subscribing Producer for a percentage of liability payments and a percentage of allocated expenses attributable to each claim handled by the Facility as sole agent for such Subscribing Producer under Section IV hereinabove. Each Subscribing Producer's percentages of liability payments and allocated expenses shall be established as provided in Appendix A-1 hereto, and shall be subject to modification only in the manner and to the extent set forth therein. To the extent that a Subscribing Producer's percentages of liability payments and allocated expenses attributable to a particular asbestos-related claim are not payable by one or more Subscribing Insurers pursuant to the Agreement and the Appendices hereto, such Subscribing Producer shall pay the percentages of liability payments and allocated expenses in question.

2. Each Subscribing Insurer shall acquiesce in and abide by the allocation of percentages of liability payments and allocated expenses to each Subscribing Producer, as described in Paragraph 1 hereinabove, and shall consider, recognize and hold each Subscribing Producer's shares of liability payments and allocated expenses attributable to each asbestos-related claim to be necessary, reasonable and proper and each Subscribing Producer to be properly bound and obligated to pay such sums. Each Subscribing Insurer shall pay a share of unallocated expenses and start-up costs as provided in Appendix A-2 hereto, which shall be subject to modification only in the manner and to the extent set forth therein.

VII. FACILITY CLAIMS HANDLING

1. Except as otherwise provided in Section IV hereinabove, the Facility shall administer, evaluate, settle, pay or defend all asbestos-related claims against Subscribing Producers and Subscribing Insurers, either within the Facility's procedures or through standard judicial means. The Facility shall handle each asbestos-related claim on behalf of all Subscribing Producers and Subscribing Insurers, and shall not settle an asbestos-related claim on behalf of fewer than all Subscribing Producers and Subscribing Insurers. The Facility shall settle each asbestos-related claim so as to extinguish claims for all damages, including punitive damages, and, in the settlement of asbestos-related claims, the Facility shall not pay punitive damages to claimants.

2. The Facility shall hire competent and experienced legal counsel to defend asbestos-related claims and shall retain such counsel as are necessary and appropriate to defend the interests of Subscribing Producers. The Facility may use its employees and independent persons to provide professional medical and other assistance and advice.

3. Actions against nonsubscribing persons may be undertaken by the Facility on behalf of Subscribing Producers and Subscribing Insurers, but the Agreement shall neither require nor preclude such actions.

4. The Facility shall require valid evidence to support each claim against Subscribing Producers and Subscribing Insurers, and shall require credible medical evidence in each case prior to making payment to a claimant. Facility personnel shall be responsible for obtaining such evidence from each claimant and verifying it.

5. A claimant shall be paid solely for asbestos-related physical impairment and dysfunction. If such claimant subsequently develops an asbestos-related malignancy, the claimant may submit a subsequent claim. In addition, the Facility may provide certain claimants whose claims have not

matured with an opportunity to resubmit a claim to the Facility should additional medical evidence become available. The Facility may enter into agreements to suspend the running of statutes of limitations with respect to claims timely presented and shall adopt uniform, streamlined, expeditious proce[illegible] including voluntary nonjudicial means of resolving disputed claims.

6. Each asbestos-related claim shall be evaluated on its individual merits, but this shall not preclude two or more asbestos-related claims from being settled simultaneously.

7. The Facility shall not make payments pursuant to a predetermined schedule of benefits, but detailed claims guidelines shall be used to evaluate and settle asbestos-related claims. The Facility shall make payments and settle claims only on behalf of Subscribing Producers and Subscribing Insurers and shall be entitled to credit for settlements made and judgments paid by Subscribing Producers and Subscribing Insurers prior to subscription in the Facility.

8. The Facility shall operate according to annual liability, defense and operational programs to be established by the Board of Directors. The Facility shall be subject to annual financial and quality control audits by persons selected by the Board of Directors and consisting of an equal number of representatives of Subscribing Producers and of Subscribing Insurers.

VIII. COVERAGE DISPUTES AND WAIVERS OF CLAIMS AND DEFENSES

1. Each Subscribing Producer and each Subscribing Insurer shall forgo all claims for declaratory relief or damages, as to other Subscribing Producers and Subscribing Insurers, relating to the application of insurance to the investigation, settlement, defense or indemnification of asbestos-related claims within the scope of the Agreement. Upon becoming a signatory to the Agreement, all such claims shall be withdrawn and

dismissed from pending actions, as to Subscribing Producers and Subscribing Insurers, with prejudice and without delay.

2. Each Subscribing Producer and each Subscribing Insurer shall forgo all claims for contribution or indemnity (other than for contribution or indemnity assumed under written agreement) against other Subscribing Producers and Subscribing Insurers with respect to all asbestos-related claims except those claims with respect to which a Subscribing Producer or Subscribing Insurer has withdrawn pursuant to Section IV hereinabove.

3. Each Subscribing Producer and each Subscribing Insurer shall waive claims for bad faith or punitive damages, as to other Subscribing Producers and Subscribing Insurers, with respect to all matters within the scope of the Agreement; *provided,* that this waiver shall not apply to claims, including punitive damages, for breach of or bad faith with respect to the Agreement.

4. This Section VIII shall not preclude a Subscribing Producer or Subscribing Insurer from seeking reimbursement under other provisions of the Agreement. In addition, there are a limited number of issues with respect to which the possibility of litigation is specifically provided for herein, but, except as otherwise provided in Paragraph 3 hereinabove, all claims for bad faith or punitive damages, as to other Subscribing Producers and Subscribing Insurers, shall be waived in such litigation.

5. Except as otherwise provided in Appendix B hereto, each Subscribing Insurer shall waive and permanently abandon and shall not assert or apply any conditions or defenses based upon, or exclusionary provisions contained in, insurance policies, which defenses or provisions have the effect of reducing or denying insurance coverage available under any of the insurance policies issued by Subscribing Insurers to Subscribing Producers. This waiver includes clauses in multiple insurance policies issued by the same insurer that seek

to shift the entire loss arising out of one occurrence to one of the insurance policies or to reduce the amounts payable under one insurance policy with respect to the entire loss by amounts paid under any one of the other insurance policies.

6. Subscribing Producers and Subscribing Insurers shall resolve through alternative dispute resolution, in the manner set forth in Appendix C hereto, any disputed issues within the scope of the Agreement and the Appendices hereto.

IX. COVERAGE BLOCK AND FUNDING

1. The "coverage block," with respect to each Subscribing Producer, consists of all insurance policies issued to such Subscribing Producer by its Subscribing Insurers to become effective prior to the date (within the period January 1, 1973 through December 31, 1979) selected by the Producer and set forth in its Schedules of Insurance and, except as set forth hereinbelow, shall not include any periods subsequent to said date; *provided,* that the coverage block shall not begin prior to the date of said Producer's first involvement with asbestos or asbestos-containing products. Insurance policies written to become effective prior to June 19, 1985, and subsequent to the ending date of a Subscribing Producer's initial coverage block may be added consecutively (by year with respect to annual limits) to such coverage block by payment, as due, of any applicable deductibles, retrospective rating premiums or self-insured retentions in accordance with the provisions of Sections XV and XVI hereinbelow and subject to appropriate credit for amounts previously paid by the Producer on account of such deductibles, retrospective rating premiums or self-insured retentions. Such insurance policies, when added, become part of the Producer's coverage block. Uninsured periods likewise may be consecutively added, and must be added if they fall between consecutively added insured periods; *provided,* that if a Producer adds a period for which it did not purchase insurance subsequent to the initial coverage

block, such Producer shall make liability payments and pay allocated expenses for that period.

2. The "exposure period," with respect to each asbestos-related claim for a particular injury, is the period from a person's first exposure to any asbestos or asbestos-containing products until first diagnosis of such injury or death resulting from such injury, whichever occurs first.

3. Any insurance policies covering a part of the exposure period for a particular claim may be used to make liability payments and to pay allocated expenses for such claim in accordance with the provisions of this Section IX, in the manner set forth in Sections X and XI hereinbelow.

4. An insurance policy of an insolvent Subscribing Insurer shall be treated as would any uninsured period in the initial coverage block; *provided,* that with respect to an insolvent London Company (exclusive of Lloyds syndicate members) that has underwritten a share within a particular insurance policy, the Subscribing Producer in question shall pay such insolvent Company's share of payments required under the insurance policy pursuant to the Agreement.

5. Insurance policies that expressly provide coverage on a specific manifestation or claims-made basis or first discovery trigger shall be included within the coverage block in a manner consistent with their terms.

6. Neither the insurance policies comprising a Subscribing Producer's coverage block nor any other insurance policies set forth in the Producer's Schedules of Insurance are dedicated solely to asbestos-related claims, and they may be used for the administration, handling or disposition of any other claims covered thereunder and, subject to the terms and conditions of the insurance policy in question, payments shall apply toward the exhaustion of any applicable insurance policy limits.

7. With respect to each Subscribing Producer, all liability payments and allocated expenses arising out of the products hazard or completed operations hazard, as defined in the insurance policy in question, shall be covered exclusively by products coverage (subject to applicable aggregate limits if any), notwithstanding the presence of allegations such as, but not limited to, strict liability, failure to warn, negligence, breach of warranty, fraud, misrepresentation, concealment or conspiracy.

X. LIABILITY PAYMENTS

With respect to a particular asbestos-related claim, liability payments attributable to such claim for each Subscribing Producer shall be made as provided hereinbelow:

1. Subject to the provisions of Section XX hereinbelow, each primary insurance policy in the coverage block that covers any part of the exposure period shall make liability payments; and each excess insurance policy in the coverage block that covers any part of the exposure period not then covered by underlying primary or excess insurance in the coverage block also shall make liability payments; *provided*, that no insurance policy shall make liability payments after its limits of liability have been exhausted. Except as otherwise provided herein, whenever a Subscribing Producer has no insurance for a particular period within the coverage block, liability payments otherwise allocable to that period shall be allocated pursuant to Paragraph 2 hereinbelow to the periods within the coverage block for which the Subscribing Producer has insurance and to periods added to the coverage block for which the Subscribing Producer did not purchase insurance.

2. The amount of liability payments to be made by each insurance policy described in Paragraph 1 hereinabove shall bear the same relation to the aggregate liability payments incurred as the part of the exposure

period then covered by such insurance policy bears to the total parts of the exposure period then covered by insurance policies in the coverage block and by periods added to the coverage block for which the Subscribing Producer did not purchase insurance; *provided*, that a Subscribing Producer shall make liability payments only if no part of the exposure period is then covered by insurance policies in the coverage block, except as otherwise provided herein.

XI. ALLOCATED EXPENSES

With respect to a particular asbestos-related claim, allocated expenses attributable to such claim for each Subscribing Producer shall be paid as provided hereinbelow:

1. Subject to the provisions of Section XX herein below, unless it expressly provides otherwise, each primary insurance policy in the coverage block that covers any part of the exposure period shall pay allocated expenses; and, unless it expressly provides otherwise, each excess insurance policy in the coverage block that covers any part of the exposure period not then covered by underlying primary or excess insurance in the coverage block also shall pay allocated expenses; *provided*, that such excess insurance policy shall only pay allocated expenses where: A) payment of allocated expenses would not apply against the aggregate limits of such excess insurance policy; or B) no primary insurance policies in the coverage block cover a part of the exposure period; or C) remaining primary insurance policies cover 10 percent or less of the period comprising the coverage block initially selected by the Subscribing Producer; or D) the initial coverage block is less than ten years and only one primary policy year remains within the coverage block. Except as otherwise provided herein, whenever a Subscribing Producer has no insurance paying allocated expenses for a particular period within the cov-

erage block, allocated expenses otherwise allocable to that period shall be allocated to the periods within the coverage block for which the Subscribing Producer has insurance paying allocated expenses and to periods added to the coverage block for which the Subscribing Producer did not purchase insurance.

2. The amount of allocated expenses to be paid by each insurance policy paying allocated expenses pursuant to Paragraph 1 hereinabove shall bear the same relation to the aggregate allocated expenses incurred as the part of the exposure period then covered by such insurance policy bears to the total parts of the exposure period then covered by insurance policies in the coverage block paying allocated expenses and by periods added to the coverage block for which the Subscribing Producer did not purchase insurance; *provided,* that a Subscribing Producer shall pay allocated expenses only if no part of the exposure period is covered by insurance policies in the coverage block paying allocated expenses, except as otherwise provided herein.

3. The payment of allocated expenses shall not apply against the aggregate limits of primary insurance policies unless the insurance policies in question expressly provide otherwise. The payment of allocated expenses shall apply against the aggregate limits of excess insurance policies unless the insurance policies in question expressly provide otherwise; *provided,* that with respect to excess insurance policies that expressly follow the provisions of underlying insurance policies for the payment of allocated expenses, such underlying language shall apply except where it is inconsistent with the terms and conditions of the excess insurance policy.

XII. PAYMENT OF ALLOCATED AND UNALLOCATED EXPENSES FOLLOWING EXHAUSTION OF LIMITS

1. Each Subscribing Insurer, with respect both to policies of insurance that expressly provide that the duty to defend ceases upon exhaustion of aggregate limits (generally, post-1966 standard form insurance policies) and to pre-1966 standard form insurance policies, shall pay allocated and unallocated expenses until its limits of liability are exhausted but not thereafter.

2. As to Subscribing Producers whose asbestos-related claims are being administered by the Facility, Subscribing Insurers that have issued pre-1966 standard form insurance policies shall establish, administer and fund an Insurance Defense Program, as set forth in Appendix E hereto, to cover the allocated and unallocated expenses of all claims that under the Agreement would have triggered a pre-1966 standard form insurance policy. The Insurance Defense Program, on behalf of Subscribing Insurers that have issued pre-1966 standard form insurance policies, shall respond, as would any insurance policy paying allocated expenses under the Agreement, to pay allocated and unallocated expenses for any claim triggering a pre-1966 standard form insurance policy year where: A) there is no obligation in such policy year to pay allocated expenses for such claim; and B) no other insurance policies are paying allocated expenses for such claim or the payment of allocated expenses by any of the insurance policies paying allocated expenses for such claim applies against aggregate limits pursuant to Section XI hereinabove or the Subscribing Producer is paying allocated expenses for such claim. The Insurance Defense Program shall not be taken into account in determining whether an excess insurance policy pays allocated expenses pursuant to Paragraph I of Section XI hereinabove.

XIII. START-UP COSTS OF FACILITY

1. All start-up costs shall be paid by Subscribing Primary Insurers in accordance with Appendix A-2 hereto.

2. Charter subscribers may mitigate the start-up expense burden through entrance fees that shall be charged to new subscribers in accordance with Appendix A-2 hereto; *provided*, that new subscribers do not include Subscribing Producers, except in the case of a new Producer with no Subscribing Insurers.

XIV. UNALLOCATED EXPENSES OF FACILITY

1. All unallocated expenses of the Facility shall be paid by Subscribing Primary Insurers and Subscribing Excess Insurers as they are called upon to make payments within the terms of the Agreement. as described more fully in Appendix A-2 hereto.

2. A Subscribing Insurer shall be relieved of the obligation to pay unallocated expenses upon the exhaustion of all of its obligations to make liability payments and to pay allocated expenses.

3. A Subscribing Producer shall be obligated to pay a share of Facility unallocated expenses only after all applicable insurance within the coverage block is exhausted.

XV. DEDUCTIBLES AND RETROSPECTIVE RATING PLANS

1. When a Subscribing Producer includes within its coverage block a particular period of insurance subject to a deductible, self-insured retention or retrospective rating plan under which payment would be due from such Subscribing Producer, that Subscribing Producer shall pay the deductible, self-insured retention or retrospective rating premium as due, except as otherwise provided herein.

2. A "date" shall be mutually agreed upon by each Subscribing Producer and its Subscribing Insurers for purposes of this Section XV and Sections XVI and XVII hereinbelow. The agreed-upon date may be the same as or different from the date unilaterally selected by the Subscribing Producer for the purpose of defining its coverage block pursuant to Section IX hereinabove. All insurance policies issued to a Subscribing Producer prior to the mutually agreed-upon date are "pre-date" insurance policies. All insurance policies issued to a Subscribing Producer subsequent to the mutually agreed-upon date are "post-date" insurance policies.

3. All deductibles and retentions, whether in pre-date or post-date insurance policies, shall be applied in a pro-rata manner, in the same proportion as the policy year is called upon to make liability payments.

4. Once retrospective rating plans have been closed, whether prior to or following the date a person becomes a signatory to this Agreement, they shall not require any additional payments by a Subscribing Producer.

5. Unless otherwise explicitly provided in the insurance policy in question, payment by a Subscribing Producer of a deductible shall not reduce the aggregate limits of such insurance policy.

6. With respect to a primary insurance policy containing a clause or endorsement providing substantially that payments made which include a deductible amount shall not increase the Insurer's liability with respect to each occurrence and aggregate, once the Subscribing Producer or the Subscribing Primary Insurer has paid an amount equal to the aggregate limits, the Subscribing Producer shall pay no more on account of such deductible and the Subscribing Primary Insurer and Subscribing Excess Insurer shall resolve between themselves the responsibility for payments for such year.

XVI. APPLICATION OF INSURANCE POLICIES WITHOUT DEDUCTIBLE OR RETENTION LIMITS

A. Pre-Date Insurance Policies

1. Where deductibles and retentions are not limited explicitly by the insurance policy language, the following schedule of multipliers shall apply to limit per policy year such deductibles and retentions:

Face Amount of Deductible or Retention	Multiplier	Policy Year cumulative Maximum
Up to $5,000.....	10	$ 50,000
Next $20,000	7.5	$200,000

2. With respect to per claim deductibles in excess of $25,000, the maximum to be paid for each policy year by a Subscribing Producer is the aggregate limit of the deductible-containing insurance policy. With respect to per occurrence deductibles in excess of $25,000, the affected parties shall resolve disagreements by negotiation, followed by non-binding alternative dispute resolution, followed, if necessary, by litigation. Any such resolution shall apply, in all respects, to the affected parties notwithstanding any other provisions of the Agreement.

3. Where an insurance policy containing a deductible explicitly provides that payment of deductibles reduces aggregate limits, then payment of deductibles shall apply against aggregate limits, following the exhaustion of which, excess insurance policies shall become available. In all other cases involving deductibles, payment of deductibles shall not apply against aggregate limits, and excess insurance shall become available after the underlying insurance policy has paid its remaining limits.

B. Post-Date Insurance Policies

1. Deductibles and retentions shall apply as written. Affected parties shall resolve any disagreements by negotiation, followed by non-binding alternative dispute resolution, followed, if necessary, by litigation. Any such resolution shall apply, in all respects, to the affected parties notwithstanding any other provisions of the Agreement.

2. With respect to deductibles or retentions in an insurance policy underlying an excess insurance policy that contains standard excess ultimate net loss and/or loss payable clauses, such excess insurance policy shall respond when liability payments equivalent to the amount of the aggregate limits of the underlying insurance policy in question have been made by the Subscribing Producer or the Subscribing Insurer or both, unless:

> (A) There is evidence that the Subscribing Excess Insurer was aware of the uncapped deductible or retention when writing its insurance policy, such evidence to be in: (1) the schedule of insurance in the excess insurance policy; (2) the underwriting file of the Subscribing Excess Insurer; (3) the underwriter's placing slip; or (4) the underwriting file of the London broker (not any American broker); and
>
> (B) Such evidence is provided to the Producer by the Excess Insurer within 60 days of March 29, 1985, or of the date that the excess insurance policy in question is listed in the Producer's Schedules of Insurance provided to such Excess Insurer, whichever occurs later.

XVII. APPLICATION OF INSURANCE POLICIES WITHOUT AGGREGATE LIMITS

A. Pre-Date Insurance Policies

1. With respect to (A) primary products liability coverage written without aggregate limits either inadvertently or before

the aggregate concept was developed, (B) primary non-products liability coverage written without aggregate limits at any date, and (C) in the coverage for any particular year the first excess occurrence policy without aggregate limits written directly above an insurance policy with aggregate limits, the following schedule of multipliers shall apply per policy year to provide aggregate limits for such policies:

Face Amount of per Occurrence/Accident Limits	Multiplier	Policy Year cumulative Maximum
Up to $100,000	10	$1,000,000
Next $200,000	5	$2,000,000
Next $200,000	3	$2,600,000
Next $500,000	1.5	$3,350,000
Above $1,000,000	1	N/A

In addition, upon exhaustion of all applicable insurance policies for the year in question, the no-aggregate primary insurance policy shall respond with coverage equal to ten times the per occurrence/accident limits up to the first $1 million of the per occurrence/accident limits, minus amounts previously applied to the maximum limit of such insurance policy.

2. All other primary products liability coverage written without aggregate limits shall apply as written. In the event of a dispute, affected parties shall engage in negotiation, followed by non-binding alternative dispute resolution, followed, if necessary, by litigation. Any such resolution shall apply, in all respects, to the affected parties notwithstanding any other provisions of the Agreement.

3. All other excess occurrence policies without aggregate limits shall apply to the extent of one per occurrence/accident limit.

B. Post-Date Insurance Policies

Post-date insurance policies without aggregate limits shall apply as written. In the event of a dispute, affected parties shall engage in negotiation, followed by non-binding alternative dispute resolution, followed, if necessary, by litigation. Any such resolution shall apply, in all respects, to the affected parties notwithstanding any other provisions of the Agreements.

XVIII. POLICY PERIODS OF OTHER THAN 12 MONTH MULTIPLES

1. Unless it expressly provides otherwise, an insurance policy of less than 12 months shall carry full aggregate limits for the term of such policy.

2. Absent agreement among the affected parties, unless the insurance policy or other documentary evidence explicitly provides that another result was intended:

(A) Where an insurance policy was extended prior to the expiration date for a period other than a multiple of 12 months: (1) if the extension was at the request of the Subscribing Producer, the period of less than 12 months shall carry pro-rata limits; and (2) if the extension was at the request of the Subscribing Insurer, the period of less than 12 months shall carry full aggregate limits;

(B) Where an insurance policy was initially written for more than one year but not for a multiple of 12 months, then the period of less than 12 months also shall carry full aggregate limits; and

(C) Where an insurance policy was canceled prior to the expiration date by either the Subscribing Producer or Subscribing Insurer, then the period of less than 12 months shall carry full aggregate limits, except where a Subscribing Excess Insurer canceled its insurance policy specifically to make its insurance policies concurrent

with underlying insurance policies and the Subscribing Producer agreed, in which case the period of less than 12 months shall carry pro rata limits.

3. Deductibles and retentions in insurance policies described in this Section XVIII shall apply in a manner consistent with the application of limits hereunder.

XIX. RETROSPECTIVE AND PROSPECTIVE APPLICATION

1. Except as otherwise provided in Section XXI hereinbelow, any and all provisions of the Agreement shall apply, as between a Subscribing Producer and Subscribing Insurer, to all liability payments and expenses incurred subsequent to the date on which both the Subscribing Producer and Subscribing Insurer became signatories to the Agreement, and with respect thereto and to the extent inconsistent herewith, shall nullify, repudiate, replace and supplant, as between such Subscribing Producer and Subscribing Insurer, any prior agreements or judicial determinations whether or not final; *provided,* that this Paragraph shall not apply to the extent that a Subscribing Insurer, by written agreement executed prior to March 29, 1985, extinguished or exhausted an insurance coverage obligation by payment of monies to a Subscribing Producer or affiliated company. With respect to such extinguishment of an insurance coverage obligation, the Subscribing Producer in question shall make liability payments and pay expenses (including payments due under Appendix E) as would the Subscribing Insurer in question under the Agreement in the absence of such extinguishment; and the Subscribing Producer shall make such payments and pay such expenses until the Subscribing Producer has paid hereunder an amount equal to the monies received from such Subscribing Insurer with respect to such extinguishment, plus investment income, if any, on such monies, and less any payments made and

expenses paid directly by such Subscribing Producer for asbestos-related claims.

2. Subject to the provisions of this Section XIX, and except as otherwise provided hereinbelow in this Paragraph 2, each Subscribing Producer and each Subscribing Insurer shall be reimbursed for liability payments and allocated and unallocated expenses, including deductibles, retrospective premiums and loss conversion factors, incurred prior to the date on which the Subscribing Producer or Subscribing Insurer became a signatory to the Agreement, such reimbursement to be made in accordance with the Agreement and as if the Agreement (but not Section VI or Appendix A-1) were in effect at the time such payments and expenses initially were incurred; *provided,* that payments and expenses incurred pursuant to an agreement explicitly providing that such payments are final or to a final settlement agreement or final judicial determination that became effective prior to the date on which the Subscribing Producer or Subscribing Insurer became a signatory to the Agreement shall not be subject to reimbursement or reallocation. Notwithstanding the provisions of Section XX hereinbelow, neither a Subscribing Producer nor a Subscribing Insurer shall make reimbursements for amounts that otherwise would have been reimbursed hereunder by an Insurer not a signatory hereto if said Insurer had become a signatory hereto.

3. Reimbursement of payments and expenses due hereunder shall be made within 90 days of the date the Subscribing Producer or Subscribing Insurer became a signatory to the Agreement. At the option of such Producer or Insurer, reimbursement of payments and expenses may be made quarterly in not more than twelve equal consecutive installments from the date payable under the Agreement, with interest upon any unpaid principal balances compounded daily and payable on a quarterly basis at the rate of interest announced publicly by Citibank, N.A., in New York, New York, from time to time as Citibank, N.A.'s Base Rate.

4. Reimbursement of payments and expenses pursuant to Paragraph 2 hereinabove shall be made by and reallocated among primary and excess insurance policies in a reasonable manner, and shall not require reallocation on an individual case basis.

5. With respect to fees and expenses incurred in asbestos insurance coverage litigation, each Subscribing Producer and each Subscribing Insurer, in the absence of agreement, may submit claims for such fees and expenses to alternative dispute resolution.

6. A Subscribing Producer shall not be reimbursed for allocated or unallocated expenses incurred in fulfilling its duty of assistance and cooperation under its insurance policies.

(A) In-house costs claimed by a Subscribing Producer to be in excess of those incurred in fulfilling its duty of assistance and cooperation under its insurance policies, in the absence of agreement with its Subscribing Insurers, may be submitted to alternative dispute resolution; and

(B) Claims by a Subscribing Producer for fees and expenses incurred for coordinating counsel, in the absence of agreement with its Subscribing Insurers, may be submitted to alternative dispute resolution.

XX. INSURANCE ISSUED BY NON-SIGNATORIES

1. Whenever a Subscribing Producer has an insurance policy issued to it for a particular period within the coverage block by an Insurer that is not a signatory hereto, such Producer shall use its reasonable best efforts, including, if necessary, the timely pursuit of litigation, to obtain a final and reasonable settlement agreement or final judicial determination concerning the application of such insurance policy to asbestos-related claims. With respect thereto, each Subscribing Producer and each Subscribing Insurer, to the extent

practicable, shall cooperate with and assist the Subscribing Producer in question.

2. Whenever, with respect to an insurance policy described in Paragraph 1 hereinabove, the Subscribing Producer, pursuant to a final settlement agreement or final judicial determination, has received from the Insurer in question monies to administer, handle or dispose of asbestos-related claims, such Subscribing Producer shall make payments and pay expenses (including payments due under Appendix E) as would the Insurer in question with respect to such Producer if said Insurer had become a signatory hereto, and the Subscribing Producer shall make such payments and pay such expenses until the Subscribing Producer has paid an amount equal to the monies received from such Insurer to administer, handle or dispose of asbestos-related claims plus investment income, if any, on such monies and less proration of any payments made and unreimbursed expenses paid directly by such Subscribing Producer for asbestos-related claims or incurred in obtaining such judicial determination or settlement agreement.

3. Whenever an insurance policy described in Paragraph 1 hereinabove would have had to make payments or to pay expenses on a particular claim under the Agreement had the Insurer in question become a signatory hereto, and the Subscribing Producer has not received monies from such non-signatory Insurer pursuant to Paragraphs 1 and 2 hereinabove, each insurance policy in the coverage block covering a part of the exposure period for such claim shall make payments and pay expenses, subject to applicable limits of liability, on a pro-rata basis in lieu of the nonsignatory insurance policy and to the extent that such insurance policy would have had to make payments under the Agreement, up to the applicable limits of such insurance policy; *provided,* that the directly overlying excess insurance policy shall make such payments and pay such expenses in lieu of the non-signatory insurance policy only if no other insurance policies in the coverage block

cover a part of the exposure period for such claim. Thereafter, upon a final settlement or final judicial determination described in Paragraphs 1 and 2 hereinabove, each Subscribing Insurer contributing hereunder shall, at its option, be reimbursed by the Subscribing Producer; *provided,* that total reimbursement of all such contributing Insurers shall not exceed the monies received by the Producer from the non-signatory Insurer to administer, handle or dispose of asbestos-related claims plus investment income, if any, on such monies and less payments made and expenses paid directly by such Subscribing Producer for asbestos-related claims or incurred in obtaining such judicial determination or settlement agreement.

4. Whenever, with respect to an insurance policy described in Paragraph 1 hereinabove, the Subscribing Producer in question does not obtain a final settlement agreement or final judicial determination pursuant to Paragraphs 1 and 2 hereinabove within two years of the date upon which a Subscribing Insurer first has actually made liability payments and actually paid allocated expenses on a pro-rata basis in lieu of such non-signatory insurance policy pursuant to Paragraph 3 hereinabove, interest shall begin to accrue at the conclusion of such two year period on all liability payments actually made and allocated expenses actually paid by such Subscribing Insurer in lieu of the non-signatory insurance policy, and shall continue until the earlier of the date that the Subscribing Producer obtains such a final settlement agreement or final judicial determination or the date that the Subscribing Insurer in question would have exhausted its obligations to make payments or to pay expenses under the Agreement if the non-signatory Insurer in question had become a signatory hereto. Such interest shall be payable on a quarterly basis from the date of first accrual at the rate of interest announced publicly by Citibank, N A., in New York, New York, from time to time as Citibank, N.A.'s Base Rate. When the Subscribing Producer in question obtains a final settlement agreement or final judicial determination, pursuant to Paragraphs

1 and 2 hereinabove, such Producer shall be reimbursed by the Subscribing Insurer in question for interest paid on any amounts that exceed the monies to which the Subscribing Insurer is entitled under the reimbursement provisions of Paragraph 3 hereinabove.

XXI. ADDITIONAL SIGNATORIES

1. Except as otherwise provided in Paragraph 2 herein below, a Producer or Insurer may become a signatory to the Agreement subsequent to June 19, 1985, only upon application to and approval by the Board of Directors of the Facility. In determining whether such a Producer or Insurer may become a signatory hereto, the Board of Directors shall determine whether the best interests of the Facility and of the other signatories would be served thereby, in order to assure that the compromises herein and commitments of resources hereunder are duly respected, that such Producer or Insurer derives no unfair advantage with respect to the other signatories and that none of the other signatories suffers any unfair disadvantage by reason of said Producer's or Insurer's failure to become a signatory to the Agreement on June 19, 1985.

2. Notwithstanding the provisions of Paragraph 1 hereinabove, a Producer or Insurer that has pending on June 19, 1985, a petition for reorganization under Chapter 11, Title 11, of the United States Code, may become a signatory to the Agreement on or before December 31, 1986; *provided,* that:

(A) Such Producer or Insurer conditionally subscribed to the Agreement prior to June 19, 1985;

(B) Such Producer or Insurer covenants and agrees to be bound by all of the provisions contained herein and in the Appendices hereto, including the respective allocations of liabilities, costs and expenses pursuant to Appendices A-1 and A-2; and

(C) The court of competent jurisdiction in such Chapter 11 proceeding shall have confirmed, by December 31,

1986, a plan of reorganization authorizing and directing such Producer or Insurer to become a signatory to the Agreement or ratifying said action.

3. With respect to any Producer or Insurer that becomes a signatory hereto pursuant to Paragraph 1 or Paragraph 2 hereinabove, Sections VIII through and including XIX of the Agreement shall not apply between such Producer and each of its Subscribing Insurers or between such Insurer and each of its Subscribing Producers, as the case may be, absent the express written consent of the Subscribing Insurer or Subscribing Producer in question. In the absence of such consent, the insurance policies in question shall be treated under Section XX as if issued by an Insurer that is not a signatory hereto.

4. Each person that subsequent to June 19, 1985, pursues litigation, other than as provided for under the Agreement, against a Subscribing Producer or Subscribing Insurer concerning matters within the scope of the Agreement shall, upon becoming a signatory hereto:

(A) Reimburse each Subscribing Producer or Subscribing Insurer for all attorneys' fees and costs incurred in such litigation after June 19, 1985, and prior to the date such Producer or Insurer becomes a signatory hereto;

(B) Forgo any claims for attorneys' fees and costs incurred in such litigation after June 19, 1985, and prior to the date such Producer or Insurer becomes a signatory hereto; and,

(C) Reimburse each such Subscribing Producer or Subscribing Insurer for all damages (including punitive damages) paid by such Subscribing Producer or Subscribing Insurer as a result of such litigation.

5. The application of the Agreement provided for herein is reasonable and necessary to obtain sufficient participation in

the Agreement by Producers and Insurers on or before June 19, 1985, to ensure the continued viability of the Facility and to further and protect the interests of the signatories hereto.

XXII. MODIFICATION, TERM AND CHOICE OF LAW

1. The Agreement, including Appendices A through E hereto, is the entire agreement between and among Subscribing Producers and Subscribing Insurers for the administration, defense, payment and disposition of asbestos-related claims. All antecedent or contemporaneous extrinsic representations, warranties or collateral provisions concerning the negotiation and preparation of the Agreement and the Appendices hereto are intended to be discharged and nullified. In any dispute involving the Agreement or the Appendices hereto, no signatory shall introduce evidence of or seek to compel testimony concerning any oral or written communication made prior to June 19, 1985, with respect to the negotiation and preparation of the Agreement. Any modifications to the Agreement and Appendix B hereto may be made only by mutual Agreement of all Subscribing Producers and Subscribing Insurers and in writing. Modifications to Appendices A, C, D and E may be made as provided therein.

2. All disputes concerning the validity, interpretation and application of the Agreement or the Appendices hereto, or any provision thereof, and all disputes concerning issues within the scope of the Agreement shall be determined in accordance with applicable common law of the states of the United States.

3. The Agreement shall have perpetual existence, notwithstanding the failure or invalidation of any particular provision in the Agreement or the Appendices hereto. Except as otherwise provided in the Agreement, neither termination of the Facility, termination of Facility membership nor withdrawal pursuant to Section IV hereinabove shall relieve a signatory to the Agreement of its rights and obligations hereunder, and each such signatory shall continue to abide and be bound by

all of the terms and conditions of the Agreement and the Appendices hereto.

XXIII. DEFINITIONS

As used in this Agreement and the Appendices hereto, the following terms shall have the following meanings:

1. *Allocated Expenses*—means all fees and expenses incurred for services performed outside the Facility that can be directly attributed to the defense and disposition of a particular asbestos- related claim.

2. *Asbestos-Related Claims*—means any claims or lawsuits against any Subscribing Producers, Subscribing Insurers or the Facility, by whomever brought and in whatever procedural posture such claims or lawsuits may arise, seeking monetary relief (whether or not such relief is the only relief sought) for bodily injury, sickness, disease or death, alleged to have been caused in whole or in part by any asbestos or asbestos-containing product; *provided,* that asbestos-related claims shall not include claims for damage to or destruction of property or statutory claims for compensation by an employee against an employer.

3. *Deductibles*—means, with respect to any insurance policy, that part of liability payments or, if the insurance policy so provides, that part of allocated expenses to be paid directly by the policyholder or reimbursed by the policyholder to the Insurer issuing such insurance policy.

4. *Insurers*—means persons that are or were engaged in the business of providing liability insurance to Producers. "Primary Insurers" means Insurers that have issued primary insurance policies to Producers. "Excess Insurers" means Insurers that have issued excess insurance policies to Producers.

5. *Liability Payments*—means the sums paid in settlement of, or in satisfaction of a judgment on, any asbestos-related claims, exclusive of allocated and unallocated expenses for such claims.

6. *Persons*—means natural persons and organizations of any kind.

7. *Pre-1966 Standard Form Insurance Policy*—means an insurance policy containing substantially the same defense-of-suits-clause as the pre-10/1/66 National Bureau of Casualty Underwriters editions of the standard general liability insurance policy.

8. *Producers*—means persons that are or were engaged in the mining, manufacturing, production, processing, fabrication. distribution, installation, sale or use of asbestos or asbestos-containing products or that may have a liability with respect to asbestos-related claims.

9. *Retrospective Rating Plans*—means rating plans that establish premiums based in whole or in part upon the policyholder's actual loss experience under the insurance policy.

10. *Self-Insured Retention*—means the amount that is to be paid or assumed by the policyholder and which amount must be exceeded before overlying insurance will respond for coverage.

11. *Start-Up Costs*—means those costs incurred by Insurers to establish the Facility, including funds used to purchase or lease Facility assets and to hire Facility personnel.

12. *Subscribing Insurers*—means Insurers that have become signatories to the Agreement.

13. *Subscribing Producers*—means Producers that have become signatories to the Agreement.

14. *Unallocated Expenses*—means the overhead, operating and administrative expenses (other than allocated expenses) incurred in administering, defending and disposing of asbestos-related claims.

XXIV. SIGNATURE

The Agreement may be executed in any number of counterparts and by different signatories hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement. Each Subscribing Producer and each Subscribing Insurer shall send one executed counterpart of the Agreement to a depository to be established and maintained by the Facility.

In WITNESS WHEREOF, the person named below has caused this Agreement to be signed by its authorized representative on this ___ day of _____, 19__

Name: _____

By: _____

Title: _____

Signed, sealed and delivered this ___ day of _____, 19__, in the presence of

_____

Witness to the signature of the above-named person.

APPENDIX A-1

PRODUCER ALLOCATION FORMULAE

In accordance with Section VI of the Agreement, the liability payments (exclusive of punitive damage judgments) and allocated expenses incurred by the Facility on each asbestos-related claim shall be allocated among all Subscribing Producers pursuant to the formulae set forth below. Each Subscribing Producer's percentages determined in accordance with such formulae or Section H below shall be its "Allocation Percentages." The formulae apply only to Subscribing Producers who had active claims pending in the tort system as of September 30, 1983. The initial allocation percentages of "new entrants" shall be determined in accordance with Section H below.

A. LIABILITY PAYMENTS

For open claims as of September 30, 1983, plus new claims reported to Subscribing Producers or the Facility for the period October 1, 1983, to one year after the opening date of the Facility, the allocation formula is as follows:

1. For each major state: Pennsylvania, California, Texas, Washington, Massachusetts, Maryland, Virginia, New Jersey, Mississippi and Connecticut.

(a) Determine the number of closed claims for each Producer as of September 30, 1983.

(b) Determine the amount of indemnity dollars, including punitive damages, if any, paid or owing for each Producer as of September 30, 1983.

(c) Divide each Producer's number of closed claims into its amount of indemnity paid or owing to arrive at an average cost per claims for each Producer.

(d) Determine the number of open claims for each Producer as of September 30, 1983.

(e) Multiply each Producer's number of open claims by each Producer's average cost per claim. This calculates each Producer's average cost times open claims.

2. For the remaining states the following procedure will be followed for each Subscribing Producer.

(a) Add together the number of closed claims in all remaining states as of September 30, 1983.

(b) Add together the amount of indemnity paid or owing, including punitive damages, if any, in all remaining states as of September 30, 1983.

(c) Divide each Producer's total number of closed claims into each Producer's total amount of indemnity paid or owing to arrive at each Producer's average cost per claim for states other than the major ones.

(d) Add together the number of open claims in the remaining states as of September 30, 1983.

(e) Multiply each Producer's number of open claims by its average cost per claim. This calculates each Producer's average cost times open claims for the remaining states.

3. Combining the major states' and remaining states' information:

(a) Add together each Producer's average cost times open claims (each Producer will have one amount for each major state and one amount for all remaining states).

(b) To determine each Producer's allocation percentage, divide each Producer's average cost times open claims by the aggregate of all Subscribing

Producers' average cost times open claims. An adjustment will be made for each Producer that had 20 or fewer closed claims in a state. For that Producer, its simple arithmetic nationwide average cost per claim (total closed claims—all states—divided into the total amount of indemnity—all states) is used as that state's average cost per closed claim.

B. CREDIT

An additional adjustment shall be made for all claims settled between September 30, 1983, and the opening of the Facility. For each Subscribing Producer, the aggregated payments in this period will be compared to the amount each Producer would have paid in the Facility.

If a Producer's aggregated payments are equal to what it would have paid in the Facility, it will receive a full credit for such payments.

If a Producer's aggregated payments are less than what it would have paid in the Facility, it will receive credit for the full amount paid, and pay an additional amount, so that its total payments equal what it would have paid in the Facility.

If a Producer's aggregated payments are greater than what it would have paid in the Facility, it will receive a credit up to the amount it would have paid. The excess amount will be considered a "benefit" to all Subscribing Producers, and will be distributed to each (including the Producer making the payments) according to its respective allocation percentage.

C. ALLOCATED EXPENSES

Each Subscribing Producer's allocated expense percentage shall be calculated by dividing its number of open claims as of September 30, 1983, by the aggregate of all open claims as of September 30, 1983, for all Subscribing Producers.

D. PUNITIVE DAMAGES

Punitive damage judgments shall not be distributed among the Subscribing Producers according to the allocation percentages of this Appendix A-1, but shall be borne by the Subscribing Producer against which the judgment was rendered and its Insurers in accordance with the Agreement.

E. NO THIRD PARTY RIGHTS

Nothing in the Agreement or this Appendix A-1 shall obligate a non-defaulting Subscribing Producer to make any payment on behalf of a Subscribing Producer who is in default in its obligations to make payments to the Facility under this Agreement or under the By-laws of the Facility, whether by virtue of insolvency, bankruptcy or otherwise.

F. AUDIT

The data submitted by Producers shall be reviewed for accuracy, consistency, reasonableness and completeness. A Producer shall no longer be bound to its allocation percentage if any necessary audit adjustments adversely affect the Producer's allocation percentage by more than 10 percent. If such a shift results from the submission of incomplete or inaccurate data on the part of a Producer, that Producer shall be bound to its adjusted percentage.

G. PROSPECTIVE ADJUSTMENT

1. Irrespective of what information is collected for other purposes, the following types of information shall be obtained relating to pending and new claims as they enter the Facility:

(a) Occupation of worker (see 3(a) below).

(b) Duties of the worker.

(c) Employment history (employers, dates, etc).

(d) Percentage of time involved in removal, repair or maintenance of asbestos-containing products.

(e) Dates of exposure to asbestos-containing products.

(f) States and/or cities where the claimant worked.

(g) Specific projects on which the claimant worked.

(h) Other as appropriate.

2. The following types of information shall be obtained from Subscribing Producers:

(a) List of all types of asbestos-containing products.

(b) Date each Producer ceased placing such asbestos-containing products in the stream of commerce.

3. Allocation percentages shall be adjusted prospectively one year after the date of opening of the Facility, and at three-year intervals thereafter, to reflect changes, if any, from the occupational mix of claims included in the data base used to compute the then existing allocation percentage. This adjustment shall be made as follows:

(a) The total number of pending claims as of September 30, 1983, shall be divided into occupational categories. These categories shall include plantworker, construction (excluding insulator), shipyard (all trades involved in ship construction and repair), insulator and such other comparable categories as are significantly represented among the pending claims. Each occupational category

shall be stated as a percentage of the whole. These constitute the "Facility Baseline Percentages."

(b) The calculation described in (a) above shall be performed for claims pending against each Subscribing Producer to develop its "Producer Baseline Percentages."

(c) Each Subscribing Producer's "Producer Baseline Percentages" shall be multiplied times its allocation percentage to determine its "Occupational Allocation Percentages."

(d) For claims filed after the data cutoff for the preceding allocation percentage calculation, the calculation described in (a) above shall be performed to determine changes, if any, in the "Facility Baseline Percentages." The increase or decrease in the percentage for each occupational category determined by subtracting the "Facility Baseline Percentages" from the newly determined percentages shall be referred to as the "Adjustment Factors."

(e) The percentages determined to be Adjustment Factors will be applied to the corresponding Occupational Allocation Percentages for each Producer to determine revised Occupational Allocation Percentages.

(f) Each Producer's revised Occupational Allocation Percentages shall be aggregated to determine each Producer's revised allocation percentage. Any shortfall or overage in the sum of the revised allocation percentages for all Subscribing Producers shall be distributed among the Subscribing Producers on the basis of the then applicable allocation percentages.

(g) In the event a new type of claim appears in significant numbers for which no Producer Baseline

Percentages are appropriate, the Subscribing Producers shall determine appropriate sharing percentages for such claims. In the absence of agreement, the matter shall be decided pursuant to Paragraph 8 below.

(h) The data and percentages computed as a result of one prospective adjustment shall be used as the bases for the next.

4. The procedure described above shall be modified as follows to account for Subscribing Producers who have ceased placing asbestos-containing products in the stream of commerce:

(a) Determine the dates on which a Subscribing Producer ceased placing asbestos-containing products in the stream of commerce.

(b) Determine the percentage of all post-September 30, 1983, claims in which the claimant's first exposure to asbestos-containing products occurred subsequent to the date determined in (a) above. In determining this percentage, alleged post-date exposures resulting from the removal, repair or maintenance of asbestos-containing products shall be excluded from those claims with a first exposure after the date determined in (a).

(c) The percentage determined in (b) above shall be used as a component in calculating the Adjustment Factor for Producers impacted by (a) and (b) above, so as to reduce such Producer's allocation percentage.

5. No Subscribing Producer's allocation percentages shall change by more than 15 percent of its initial allocation percentages as a result of any one prospective adjustment, except as may be provided pursuant to Section H below. Any amount eliminated from the adjustment by application of this cap shall be distributed

among other Subscribing Producers on the basis of their then applicable allocation percentages.

6. The percentage change in any Subscribing Producer's allocation percentage, including application of Paragraph 5 above, shall be applied to its allocation percentage for Allocated Expenses as well as Liability Payments.

7. All matters pertaining to the prospective adjustment shall be decided solely by the Subscribing Producers.

8. Any Subscribing Producer that believes that application of any prospective adjustment to its particular facts is inequitable, that any determination required by Subparagraphs G.3(a) or 4(a) above is incorrect, or that the calculation of any prospective adjustment has been performed inaccurately may take the matter to alternative dispute resolution within the Facility. Such Producer shall bear the burden of proof. If 51 percent of the Subscribing Producers with 51 percent of the allocation percentages (for liability or allocated expenses depending on the issue involved) so agree, application of the prospective adjustment may be changed without an alternative dispute resolution proceeding. This shall not preclude any Subscribing Producer who does not agree from taking the matter to alternative dispute resolution within the Facility. Such Subscribing Producer shall bear the burden of proof. No determination through alternative dispute resolution or by the Subscribing Producers may alter the 15 percent limitation established in Paragraph 5 above.

H. NEW ENTRANTS

Those Subscribing Producers whose data were not part of the data base from which the Producer allocation formulae

were derived shall submit such data. In the event the data that any such Producer submits are substantially the same in qualitative and quantitative terms as the existing data base, the Producer shall have its allocation percentages computed pursuant to these formulae. Producers whose data are not substantially the same in qualitative and quantitative terms shall be admitted on a mutually-agreeable basis.

APPENDIX A-2

INSURER ALLOCATION OF START-UP COSTS AND OPERATING EXPENSES

1. Primary Objective

Fairness in allocation method or formula decided upon.

2. Secondary Objective

A. Ease of administration.

B. Attractiveness to prospective members, *i.e.*, sales appeal.

C. Long-term workability.

3. Types of Funding

Funding will be divided into three main areas:

A. Funds (seed money) required to be expended before the final subscription period is concluded. These funds are reimbursable.

B. Funds provided by a single initial assessment of all Insurer subscribers to be paid no later than thirty days after the final subscription date. These funds are to be used for necessary expenses incurred before the Facility becomes operational.

C. Funds required to ensure the ongoing operation of the Facility, including the cost of the development of the data processing system and its continued operation and maintenance, including the repayment of the initial seed monies furnished by members of the Asbestos Claims Council prior to the final subscription date.

4. Method of Funding

As regards each area of funding required, a separate method is provided for:

A. First, as regards funds (seed money) required to be expended before the final subscription date or at most before a period not to exceed thirty days thereafter.

(1) It should be noted that members of the Asbestos Claims Council have already incurred many thousands of dollars of expense, and this expense is considered to be part of seed money required and will be included as part of the pre-operation expenditures as being reimbursable. It is expected that prior to the close of the final subscription period such expenses will continue to be incurred (*e.g.* Center for Public Resources charges, consultant fees and other similar expenses), that these expenses will continue to be paid by Council members as heretofore and that these additional expenses will likewise be reimbursable.

B. Second, as regards the single initial assessment for funds to be used for expenses between the final subscription date and the date when the Facility becomes operational:

(1) Immediately after it is determined that the number of subscriptions is sufficient so that the plan is a viable one, a nonreimbursable initial assessment fee of $100,000 will be assessed against each and every non-Lloyds and London Company subscriber. At this same time, a nonreimbursable initial assessment fee in the amount of $250,000 will be assessed as a total sum against all those subscribers represented by Lloyds and London Companies. All the monies collected by reason of these initial assessment fees are intended to cover expenses incurred between the end of the subscription period and the establishment of an ongoing line of credit to be established as soon as possible after the incorporation of the entity is finalized.

(2) If there should be any monies remaining in this fund when the Facility operations begin, those monies will pass into the general operating fund designed to cover the expenses of the operation.

(3) Any Insurer that subscribes to the Facility after the close of the initial subscription period will pay an initiation assessment of two times the initial assessment fee of charter subscribers, and that money will pass into the appropriate operating fund.

C. As regards funds to ensure the ongoing operation of the Facility, the cost of development, continued operation and maintenance of the data processing system and the repayment of the initial seed money to members of the Asbestos Claims Council:

(1) A surcharge which will be established by the Comptroller will be made against each Insurer (or Producer if its claims are handled by the Facility after the exhaustion of available coverage) for each of its claims as same is disposed of predicated upon (a) a percentage of indemnity paid and (b) a percentage of the allocated expenses paid. In no way or manner will the amounts of this surcharge in any way reduce or in any other manner impact the amount of indemnity coverage available to any insured.

(2) For the purposes of this surcharge, a claim will be considered to be a separate matter for each Insurer (Producer) for whom either an indemnity payment is made or an allocated expense is incurred or where both an indemnity payment is made and an allocated expense incurred for the same matter. For these purposes, the definition of indemnity payment and allocated expense is the common one used for insurance accounting purposes.

(3) The percentage of the surcharges may be different for indemnity and for allocated expense. By assessing a surcharge against indemnity, the problem which arises by

reasons of Insurers (or Producers) making only indemnity payments at any one time is addressed. By assessing surcharges against allocated expense, the problem which arises by reason of the Facility successfully defending claims so that no indemnity need be paid is addressed in that these users also contribute. The underlying rationale is to assure that all users contribute to the cost of operating the Facility to the extent that the usage can be properly measured.

(4) The amount of the surcharge will be determined after studies are concluded as to the estimation of annual likely indemnity and allocated payments.

(5) As soon as possible after the Facility becomes a corporate entity, an initial line of credit will be obtained to ensure that sufficient funds are available for all preliminary and initial stages of the operation.

(6) During the initial months of operation, the Comptroller will draw down from the line of credit that amount of money which is required as a difference between operating expenses and surcharges received to meet the obligations incurred by reason of organization and operating expenses.

(7) As the Facility operations mature, there will come a time when the monthly surcharges collected will exceed the total monthly operating expenses. Those excess funds will now be applied first toward reinstating the full amount of the line of credit and thereafter toward reimbursing in equal shares those carriers who advanced seed money during the presubscription period and the time between the end of the subscription period and the collection of the assessment fees referred to in Paragraph 4-B(1).

(8) At the time the line of credit becomes fully reimbursed, it will be reduced to an amount felt to be nec-

essary and proper by the Comptroller to ensure against monthly shortfalls in surcharges collected.

(9) Surcharges will continue to be levied in the same manner until the Comptroller has acquired a fund of money that will be sufficient to ensure the continued operation of the Facility for a period of at least two years forward.

(10) At that point in time, the Comptroller will reevaluate the surcharge schedule and recommend to the Board of Directors a schedule that will continue the level of available operating funds at a level which will ensure two future years of operation.

(11) Thereafter for the purposes of timing, an evaluation of the funding, etc. will be made twice each year, *e.g.*, as of June 30 and December 30. At that time, the Comptroller will report and make recommendations to the Board of Directors. The Board will then direct the necessary action.

(12) The Comptroller may recommend the discontinuance of the line of credit at any time when he deems he has accumulated sufficient operating funds to ensure at least two years of future operation.

(13) As regards the cost of development, continued operation and maintenance of the data processing system, this will be considered to be a part of the annual operating expenses of the Facility and such expenses will be covered by the surcharge in the same manner as are all other expenses.

Further, as regards the data processing system, it is contemplated:

(a) That the development costs of the system after the completion of the user specification period will be in the area of $5,500,000. This is the best available estimate as of October, 1984.

(b) That the Facility will enter into a likely seven year contract with the vendor for the operation of the system and that the monthly charges for paying for the cost of development plus operation of the system will be in the area of $180,000 per month. These charges will be included in the Facility operation budget.

(c) Because the payment of the development costs is spread across a contract that contemplates at least seven years of operation, it is agreed and understood by all Insurer subscribers that if the Facility should cease to operate before the development costs are fully paid, the remaining sum due will be divided among all Insurer subscribers, with the exception of Lloyds and the London companies, in equal shares in order to discharge this obligation.

APPENDIX B

CONDITIONS, DEFENSES AND EXCLUSIONS RESERVED BY SUBSCRIBING INSURERS

Subscribing Insurers reserve the right to raise only the following conditions, defenses or exclusions pursuant to Paragraph 5 of Section VIII of the Agreement, and Subscribing Producers reserve the right to contest same: disputes concerning such matters shall be resolved pursuant to Paragraph 6 of Section VIII of the Agreement:

1. That particular insurance policies were never issued or were canceled; *provided*, that a Subscribing Insurer that disputes the existence of an applicable insurance policy or part thereof notifies the affected Subscribing Producer of its intention to assert such a defense. The notice required under this provision shall identify the policy or policies involved and shall be given within 30 days of March 29, 1985, or of the date that the insurance policy in question is listed in the Producer's Schedules of Insurance provided to such Insurer, whichever occurs later.

2. That, with respect solely to matters occurring subsequent to June 19, 1985:

(a) the Subscribing Producer misrepresented or failed to disclose information material to an underwriter's issuance of an insurance policy, including information on the declarations page; or

(b) the Subscribing Producer breached its duties under an insurance policy, in the event of an occurrence, claim or suit, to give notice and to assist and cooperate; *provided*, that notice to and cooperation with the Facility shall be deemed to satisfy these duties.

3. That, with respect solely to matters occurring subsequent to June 19, 1985, or matters that were the subject of a dispute between an Insurer and Producer prior to May 1, 1984, the Subscribing Producer failed to pay insurance policy premiums.

4. That insurance coverage is not available due to or is affected by multiple insurance policies issued solely to comply with state requirements, the inapplicability of a pre-merger or pre-acquisition insurance policy to after-acquired liabilities, exhaustion of applicable limits of liability, or the existence or non-existence of a defense obligation in an insurance policy or the obligation to provide supplementary defense payments; *provided*, that nothing contained herein shall be deemed to modify Sections XI, XII or XVII of the Agreement.

5. That the Subscribing Producer failed to permit inspection and audit for retrospective premium purposes for a period of three (3) years after the ending date of the insurance policy period.

6. That, subsequent to May 1, 1984, and other than by operation of the Agreement, a Subscribing Producer prejudiced the subrogation rights of a Subscribing Insurer or assigned an interest in an insurance policy without the approval of the Insurer.

7. That coverage under an insurance policy is not available due to express exclusions for claims otherwise recoverable under automobile insurance, claims for statutory worker's compensation benefits or claims otherwise recoverable under worker's compensation or employer's liability insurance.

8. That coverage under an insurance policy is not available due to express exclusions for claims involving particular territories, particular operations of the insured, particular locations, particular products or particular diseases.

9. That any changes in any insurance policies must have been made in writing pursuant to policy terms in order to be effective.

10. That the insurance policy in question does not cover punitive damage awards due to an express exclusion or because the law of the state governing the insurability of punitive damages in the particular case holds that punitive damage awards are not covered by insurance because of public policy or contract interpretation; *provided*, that if such holding is by other than the highest court of the state in question, the Subscribing Producer and the Subscribing Insurer each shall pay 50 percent of the punitive damage award. Any disagreement as to whether punitive damage awards are covered by insurance shall be resolved by negotiation, followed by non-binding alternative dispute resolution, followed, if necessary. by litigation. Any such resolution shall apply, in all respects, to the affected parties notwithstanding any other provision of the Agreement.

APPENDIX C

ALTERNATIVE DISPUTE RESOLUTION

INTRODUCTION

Alternative Dispute Resolution ("ADR") is the method for resolving disputed issues as provided in the Agreement. ADR involves three basic stages: 1) good-faith negotiation; 2) a proceeding concluding with a binding decision if litigation is not allowed and a non-binding decision if litigation is allowed (the "Proceeding"); and 3) an appellate process for the binding decision.

At the negotiation stage, a person (the "Neutral") will be selected who will be empowered to employ a full range of informal, mediational techniques with Principals present. After the Proceeding there will be a final settlement conference with the Judge and/or the Neutral as a last attempt to reach a Party-fashioned solution. This is to be followed by a binding decision or litigation if litigation is allowed. The binding decision may be appealed to a panel of three Judges.

Before and during formal initiation of the ADR Procedure, all Parties are strongly encouraged to engage freely in any informal negotiation desired with the express goal of reaching a negotiated solution.

OBJECTIVES

1. TO ENCOURAGE A NEGOTIATED RESULT RATHER THAN USE OF ADR.
2. TO MAXIMIZE OPTIONS FOR PRAGMATIC SOLUTIONS.
3. TO BE COST-EFFECTIVE.
4. TO BE SPEEDY.
5. TO BE EFFICIENT.

6. TO BE FAIR.

7 TO ENCOURAGE CONSISTENCY OF INTERPRETATION.

DEFINITIONS

1. Days—Business days.

2. Party—When there are more than two Parties involved in a dispute, the use of the word Party in this document shall be interpreted to mean all Parties on a side. Thus, for example, joint Parties must exercise strikes collectively.

3. Principal—An individual with settling authority for a Subscriber.

4. Subscribers—Subscribing Producers and Subscribing Insurers.

THE NEGOTIATION

Day

1.00 **Negotiation Procedure**

1 1.1 A Party or Parties notify the ADR branch of the Asbestos Claims Facility* ("Facility") of the dispute and request ADR.

2 1.2 Case is docketed by the Facility.

2.00 **Aggregation of Issues Between Disputing Parties**

2.1 Issues may be aggregated only by agreement of all Parties.

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* The Facility is more particularly described in Sections II through VII of the Agreement. ADR can be modified by unanimous agreement of the Parties, the Trial Judge and the Facility. The Parties may apply to the Trial Judge for modification of the ADR Procedure on a showing of good cause.

Day

3.00 **Good Faith Negotiation**

3.1 The Facility shall maintain a Panel of Neutrals who have been approved by the Initial Subscribers. These Neutrals will be qualified and prepared to apply the full range of informal mediational processes and techniques. Criteria for selecting a Panel of Neutrals are set forth in Exhibit 1 hereto.

3 3.2 If the Parties can agree on one or more Neutrals selected from the Panel, they will notify the Facility of the name or names selected. If the Parties cannot agree, the Facility will notify the Parties of a list of seven available Neutrals.

5 3.3 The Parties will notify the Facility of three mutually acceptable Neutrals. Each Party may strike two names from the list provided by the Facility; the initiating Party strikes first by telephone.

7 3.4 The Facility will notify the Parties of the name of the Neutral and the time and the place of the first meeting. There shall be no *ex parte* communications with the Neutral.

9 to completion 3.5 Good-faith negotiations shall be held with the Principals and the Neutral present. Good-faith negotiations require that the Parties make good-faith offers and/or demands. The Parties and the Neutral should undertake to develop all options for resolution and prepare:

3.51 A statement of issues.

Day

3.52 A statement of desired results.

3.53 An exchange of key documents, testimony, and other relevant information.

3.54 A statement of offers.

3.6 If, in the judgment of the Neutral, good-faith negotiations have taken place and the Parties cannot achieve resolution, either Party may initiate the Proceeding. If the Parties feel that good-faith negotiations have taken place and the Neutral does not agree, the Parties may initiate the Proceeding. If one Party believes that good-faith negotiations have taken place, but the other Party and the Neutral disagree, the Parties shall proceed as set forth in the Procedure Manual.

THE PROCEEDING

Day

4.00 **Initiation of the Proceeding**

1 4.1 The Parties notify the Facility of the request for the Proceeding.

2 4.2 The Facility notifies all Subscribers of the request for the Proceeding.

3-10 4.3 New Parties may be joined at this point if all existing Parties agree. A written consent by all Parties to such joinder must be filed with the Facility no later than seven days after notification by the Facility of the Proceeding.

Day

4.4 The Facility shall maintain a Panel of Trial Judges who have been approved by the Initial Subscribers. Criteria for selecting a Panel of Trial Judges are set forth in Exhibit 2 hereto.

11 4.5 If the Parties can agree on one or more Trial Judges from the Panel, they will notify the Facility of the name or names selected. If the Parties cannot agree, the Facility will notify the Parties of a List of seven available Trial Judges. The list of Trial Judges shall not include the Neutral, and there shall be no communication between the Trial Judge and the Neutral.

13 4.6 The Parties shall notify the Facility of three mutually acceptable Trial Judges. Each Party may strike two names from the list provided by the Facility; the initiating Party strikes first by telephone.

15 4.7 The Facility shall notify the Parties of the name of the Trial Judge and the time and place of the first conference. There shall be no *ex parte* communications with the Trial Judge.

16 4.8 The Parties shall forward to the Trial Judge a joint statement of facts, issues, requested relief, and requests for documents not previously produced and other relevant information.

19 5.00 **Initial Conference.** Principals need not be present.

5.1 The Trial Judge shall review and clarify the statement of dispute, issues, requested relief, and status of settlement; confirm the trial date, place and schedule; and rule on any disputes relating to document production.

Day

6.00 **Discovery**

24 6.1 Production of Documents. Parties will produce all requested documents not previously produced. The Trial Judge will be present during the production.

29-38 6.2 Depositions.

6.21 No more than five days per side unless the Trial Judge rules otherwise. The Trial Judge has the discretion to rule otherwise in cases where there is a multiplicity of Parties or issues, or for good cause shown.

6.22 The Trial Judge will be present unless the Parties agree otherwise.

40 7.00 **Pre-Proceeding Conference.** The Principals and the Trial Judge must be present.

7.1 The Parties shall exchange and provide the Trial Judge (in writing) with:

a. Lists of witnesses and summaries of direct testimony related to issues to be proven.

b. Exhibits related to issues to be proven.

c. Trial briefs.

7.2 The Trial Judge shall resolve issues such as authenticity, admissibility, etc.

47-57 8.00 **Proceeding.** The case shall be presented to the Trial Judge and the Principals, who are required to be present.

8.1 The first Party may put on its direct case for up to two days. The second Party may cross examine for up to one day. The Trial Judge may summarize the state of evidence.

Day

8.2 The second Party may put on its direct case for up to two days. The first Party may cross examine for up to one day. The Trial Judge may summarize the state of evidence.

8.3 Each side may have up to one-half day for rebuttal.

8.4 Argument. The First Party may present direct argument for up to one hour. The Second Party may present rebuttal for up to one-half hour. The Second Party may present direct argument for up to one hour. The First Party may present rebuttal argument for up to one-half hour. Questioning by the Trial Judge is allowed.

8.5 A record of the Proceeding shall be kept.

8.6 The Trial Judge has the discretion to alter the length of the Proceeding in cases where there is a multiplicity of Parties or issues, or for good cause shown.

58 9.00 **Final Settlement Conference**

9.1 The Trial Judge shall meet with the Principals. If all the Parties agree, the Trial Judge may:

a. Discuss the strengths and weaknesses of each Party's case;

b. Question the Parties in an effort to conciliate; and

c. Engage in mediation, as the Trial Judge sees fit.

60 10.A **Non-Binding Decision,** where the issue is one for which litigation is allowed.

10 A1 There will be no written opinion.

Day

10.A2 An advisory opinion will be provided to any Party who requests it. The advisory opinion shall not be provided until two days after the Final Settlement Conference.

10.A3 Nothing from the ADR process is admissible in subsequent litigation.

10.A4 There will be a cooling off period of up to two days if the Trial Judge deems it advisable.

62 10.A5 A final negotiation session shall be held after the non-binding decision, with the Trial Judge and/or the original Neutral present, if all Parties agree.

10.A6 If settlement is not achieved at the final negotiation session, the Parties proceed to litigation.

72-79 10.B **Binding Decision,** where the issue is one for which litigation is not allowed. The Parties will have one week to file additional briefs or comments, and then the Trial Judge shall issue a written opinion and judgment within two weeks of the close of the Proceeding or the submission of additional papers, whichever is later. The opinion and judgment shall contain:

10.B1 Statement of relief granted.

10.B2 Statement of costs, expenses and fees awarded to the prevailing party. Prejudgment interest shall be awarded as provided in the Agreement and the Procedure Manual.

10.B3 Findings of Fact and Conclusions of Law shall be issued.

10.B4 Petitions for rehearing may be filed but will not affect the time for appeal.

APPELLATE PROCESS

Day

11.00 **Appeal**

1 11.1 No later than 10 days after the decision any Party desiring to appeal shall notify the Facility. The notice of appeal shall include a statement of the dispute, the requested relief, and the decision rendered below.

2 11.2 The Facility will docket the appeal and notify all Subscribers.

11.3 The Facility shall maintain a Panel of Appellate Judges who have been approved by the Initial Subscribers. Criteria for selecting a Panel of Appellate Judges are set forth in Exhibit 3 hereto.

3 11.4 If the Parties can agree on three or more Appellate Judges from the Panel they will notify the Facility of the names selected. If the Parties cannot agree, the Facility will notify the Parties of a list of nine available Appellate Judges. The list of Appellate Judges shall not include the Neutral or the Trial Judge, and there shall be no communications between the Appellate Judges and either the Neutral or the Trial Judge.

4 11.5 The Parties shall notify the Facility of five mutually acceptable Judges. Each Party may strike two names from the list provided by the Facility; the initiating Party strikes first by telephone.

6 11.6 The Facility shall notify the Parties of the three Appellate Judge Panel and the date of the appellate pre-argument conference which shall be held three days later.

Day

9 12.00 **Appellate Pre-Argument Conference**

12.1 The Court shall review the issues on appeal and the relief requested.

12.2 The Court shall confirm that the appeal is in good faith and, if all the Parties agree, shall conduct settlement negotiations as to the issues on appeal.

12.3 The Court shall confirm the appeal schedule.

13.00 **Record On Appeal**

11 13.1 The Appellant shall file the record with the Facility.

13 13.2 The Appellee shall supplement the record if necessary.

14.00 **Briefs**

21 14.1 The Appellant's brief is due 10 days after the filing of the record.

41 14.2 The Appellee's brief is due 20 days after filing of the Appellant's brief.

46 14.3 The Appellant's reply brief is due five days after filing of the Appellee's brief.

51 15.00 **Argument**

15.1 Appellant—45 Minutes.

15.2 Appellee—One Hour.

15.3 Appellant—15 Minutes.

15.4 The Court may examine counsel either during the argument or after the argument is closed.

65 16.00 **Decision.** The Court shall issue a written opinion within two weeks of the close of the argument. The opinion shall contain:

Day

16.1 Statement of relief granted.

16.2 Statement of costs, expenses and fees awarded to the prevailing Party. Pre-judgment interest shall be awarded as provided in the Agreement and the Procedure Manual.

66 17.00 **Rehearing.** The procedure for Rehearing at the appellate level (and at the Proceeding) shall be as provided in the Procedure Manual.

100.00 **Miscellaneous Provisions**

100.1 Amicus Curiae Briefs

a. Any Subscriber may file an amicus curiae brief as a matter of right at either the Proceeding or Appellate stage.

b. The Court may accord the brief whatever weight it deems appropriate.

100.2 The standard for reversal on appellate review is whether the decision is clearly erroneous. If all Parties request, the Trial Judge may help the Parties resolve their differences, and efforts by the Trial Judge in this regard are not subject to appeal.

100.3 All questions of law, including conflicts of law and burden of proof, shall be resolved by the Trial Judge as provided in the Procedure Manual.

100.4 The Trial Judge and the Appellate Panel shall have the power to impose sanctions for failure to comply with any aspect of the ADR Procedure. Sanctions also may be imposed for frivolous appeals and friv-

olous petitions for rehearing. The sanctions may include costs, fees, and expenses; the relief requested by any Party; and any further monetary or other sanctions that the Trial Judge or the Appellate Panel deems appropriate. There will be a right of appeal with regard to any award of sanctions by the Trial Judge.

100.5 The Board of Directors of the Facility shall provide guidance and instructions regarding the ADR Procedure and all problems relating thereto, with assistance from the General Counsel's office as necessary.

100.6 There will be no precedential effect of any decisions rendered in the ADR Procedure.

100.7 All decisions in the ADR Procedure shall be filed with the Facility but will be maintained by the Facility on a confidential basis and shall be available only to Subscribers.

100.8 The Federal Rules of Evidence will be applied by the Trial Judge unless modified by the Procedure Manual. Depositions and trial transcripts in prior actions automatically will be admissible, subject to whatever weight the Trial Judge determines to give such evidence.

100.9 The Facility will bear the costs of the ADR Procedure and the costs of the Neutrals until Initiation of the Proceeding (4.00). From then on, all costs will be paid by the losing Party. The procedure for payment of such costs is provided in the Procedure Manual.

PANEL OF NEUTRALS

It is anticipated that the panel of Neutrals will be drawn primarily from the CPR Judicial List. However, all Neutrals shall be approved by the Initial Subscribers.

The criteria to be used to select a Neutral are as follows:

1. Neutral and unbiased toward any of the parties or the industries involved.

2. Distinguished and respected in the business or legal communities.

3. Available on a sustained basis and on reasonably short notice.

4. Experienced in the techniques of Alternative Dispute Resolution or willing and able to learn quickly.

5. Unquestioned integrity.

6. Experienced.

7. Creative.

PANEL OF TRIAL JUDGES

It is anticipated that the panel of Trial Judges will be drawn primarily from the CPR Judicial List. However, all Trial Judges shall be approved by the Initial Subscribers.

The criteria to be used to select a Trial Judge are as follows:

1. Neutral and unbiased toward any of the parties or the industries involved.

2. Distinguished and respected in the business or legal communities.

3. Available on a sustained basis and on reasonably short notice.

4. Unquestioned integrity.

5. Creative.

6. Judicial experience at the trial court level.

7. Exhibits judicial temperament; that is, the judge is:
   a. Impartial;
   b. Patient;
   c. Courteous;
   d. Decisive;
   e. Fair; and
   f. Effective.

EXHIBIT 2

PANEL OF APPELLATE JUDGES

It is anticipated that the panel of Appellate Judges will be drawn primarily from the CPR Judicial List. However, all Appellate Judges shall be approved by the Initial Subscribers.

The criteria to be used to select an Appellate Judge are as follows:

1. Neutral and unbiased toward any of the parties or the industries involved.

2. Distinguished and respected in the business or legal communities.

3. Available on a sustained basis and on reasonably short notice.

4. Unquestioned integrity.

5. Creative.

6. Judicial experience at the appellate court level.

7. Exhibits judicial temperament; that is, the judge is:

   a. Impartial;

   b. Patient;

   c. Courteous;

   d. Decisive;

   e. Fair; and

   f. Effective.

EXHIBIT 3

APPENDIX D

SCHEDULES OF INSURANCE

Following, are: 1) guidelines to assist in the completion of the Schedules of Insurance pursuant to the provisions of the Agreement; 2) the forms of Schedules to be used; and 3) the form of Schedules Certification to be executed by each Subscribing Producer and its Subscribing Insurers. All policies of insurance affording general liability, products liability or premises coverage should be scheduled hereunder. Each Subscribing Producer and each of its Subscribing Insurers shall execute the Schedules Certification (in the form set forth hereinbelow) within 20 days of the date that such Producer or Insurer becomes a signatory to the Agreement, and shall note thereon any disputed issues with respect thereto. The failure by a signatory to the Agreement so to execute the Schedules Certification within such 20 day period shall be deemed an assent to and valid execution of the Schedules in question by such signatory.

1. **Initial Coverage Block:** Set forth the closing date of the initial coverage block. For the definition of coverage block, see Section IX of the Agreement. All insurance policies covering the period prior to the closing date should be listed on Section 1 of the form of Schedules. All insurance policies covering the period subsequent to the closing date should be listed on Section 2 of the form of Schedules.

2. **Pre-Date Insurance Policies and Post-Date Insurance Policies:** Set forth the date mutually agreed upon in accordance with

Section XV of the Agreement. All pre-date insurance policies and all post-date insurance policies should be listed on the appropriate Sections of the form of Schedules.

3. **Insurer:** Specify exactly as named in the insurance policy or other evidential document of coverage.

4. **Policy Period:** Refer to the actual period for which the insurance policy is in effect. For policy periods of other than 12 month multiples, see Section XVIII of the Agreement.

5. **Policy Type:** Specify whether primary, excess or self-insured.

6. **Policy Form:** Enter the codes that describe the insurance policy form:

   A. Pre-1966 Standard Form Insurance Policy, as defined in Section XXIII of the Agreement.

   B. The insurance policy does not pay allocated expenses following exhaustion of aggregate limits. See Section XII of the Agreement.

   C. The insurance policy does pay allocated expenses following exhaustion of aggregate limits. See Section XII of the Agreement.

D. The insurance policy expressly provides coverage on a specific manifestation basis.

E. The insurance policy expressly provides coverage on a claims-made basis.

F. The insurance policy expressly provides coverage on a first discovery basis.

G. The insurance policy pays allocated expenses and such expenses do not apply against aggregate limits. See Section XI of the Agreement.

H. The insurance policy pays allocated expenses and such expenses apply against aggregate limits. See Section XI of the Agreement.

I. The insurance policy does not pay allocated expenses. See Section XI of the Agreement.

7. **Per Occurrence/ Accident Limits:** Refer to the limit for any one occurrence or any one accident.

8. **Products Aggregate:** Refer to the aggregate limit applicable to products bodily injury liability coverage. Certain insurance policies may contain a combined aggregate for bodily

injury, property damage and other covered perils; if so, refer to the combined limit.

With respect to insurance policies without aggregate limits, see Section XVII of the Agreement.

9. **Products Aggregate Consumption:**

The function of the Aggregate Consumption Summary is to track the consumption of total products liability aggregate limits by asbestos products bodily injury claims.

With respect to an insurance policy containing a deductible that explicitly provides that payment of deductibles reduces aggregate limits, see Section XV of the Agreement.

With respect to the payment of allocated expenses applying against aggregate limits, see Section XI of the Agreement.

10. **Non-Products Coverage:**

To impute aggregate limit for non-products coverage, see Section XVII of the Agreement.

11. **Deductibles and Retentions:**

Enter the codes that describe the deductible or retention:

J. Per occurrence deductible.

K. Per claim deductible.

L. Deductible reduces the aggregate limits of the insurance policy.

M. Self-insured retention.

N. Loss limit.

Where deductibles and retentions are not limited explicitly by the insurance policy language, see Section XVI of the Agreement.

Where an insurance policy containing a deductible explicitly provides that payment of deductibles reduces aggregate limits, see Section XV of the Agreement.

* * *

APPENDIX D—SCHEDULES OF INSURANCE

CERTIFICATION

The foregoing comprises the Schedules of all relevant policies of insurance known to the Subscribing Producer and to any of its Subscribing Insurers as of this date. Any insurance policy that subsequently becomes relevant (by discovery or otherwise) will be added to these Schedules by amendment or addendum, and it is agreed that all Subscribing Insurers are committed to cooperate with and assist the Subscribing Producer in the continuing search for policies of insurance.

These Schedules of Insurance are subject to the terms and conditions of the Agreement to which they shall be attached and form a part thereof. The undersigned acknowledge and agree that such Schedules of Insurance are in compliance with the provisions of the Agreement.

Dated: _____

Subscribing Producer: _____

Subscribing Insurers: _____

_____

_____

_____

_____

_____

_____

_____

_____

APPENDIX E

INSURANCE DEFENSE PROGRAM

1. Purpose:

The purpose of the Insurance Defense Program (herein called the "Defense Program" or the "Program") shall be solely to implement the provisions of Paragraph 2 of Section XII of the Agreement.

2. Definitions:

"Covered claims" means claims to which the Defense Program applies under Section 3 below.

"Base standard charge" means the standard charge for a single pre-1966 standard form insurance policy issued to a Subscribing Producer in the lowest risk category.

"Standard charge" for any calendar year means the amount designated as such in the Subscribing Insurer's Standard Charge Notice for such calendar year.

"Base surcharge" means the surcharge for a single pre-1966 standard form insurance policy issued to a Subscribing Producer in the lowest risk category.

"Surcharge" means the amount due as a surcharge under Section 7 below.

"Reserve Fund" means the amount, including all investment income thereon, held by the Administrators for the payment of defense expenses expected under the Defense Program.

"Administrators" means those holding office as such under the Defense Program.

3. Application:

The Defense Program applies only to those asbestos-related claims against Subscribing Producers that:

(a) are being administered by the Facility; and

(b) under the Agreement would have triggered an obligation to pay allocated expenses and unallocated expenses under a pre-1966 standard form insurance policy.

The Defense Program covers only the payment of allocated expenses and unallocated expenses attributable to such claims. It does not provide coverage for liability payments. The Defense Program shall not survive termination of the Facility.

4. Participation:

Each Subscribing Insurer that has issued a pre-1966 standard form insurance policy to a Subscribing Producer shall become a participant in the Defense Program and shall be bound by all of the provisions of the Program.

Each participant shall pay promptly on notice from the Administrators all standard charges and surcharges due under the Defense Program.

5. Administrators:

The Defense Program shall be administered by a Committee of Administrators, with no less than six in number, all of which shall be participants. The Committee shall include representatives of all three classes of participants, those with relatively high, moderate or low exposure to charges under the Defense Program.

The Committee will be appointed for a designated term of years by the Insurer members of the Board of Directors of the Facility. The Board will designate carriers to be members, and the carriers will designate the individual representative who will represent them. Each Administrator shall have one vote.

The Committee of Administrators shall have the full power to administer the Defense Program including power to deal with the Facility with respect to the defense of claims subject to the Defense Program and the appropriate amounts to be

paid the Facility for conducting such defense and full power to determine the financing of the Defense Program including the power to determine standard charges and surcharges and to accumulate reserves.

The Committee will adopt schedules, charges and otherwise conduct their business on the basis of majority vote. If for some reason a majority decision cannot be reached, then the matter will be referred to the Insurer members of the Board of Directors for resolution. If a majority vote is not possible at that time, then the matter is referred to the Chief Financial Officer for an absolute and binding decision.

6. Mutual Sharing or Insurance Nature of the Defense Program:

The defense expenses incurred under the Defense Program shall be shared mutually by the participants in relation to:

(a) the number of pre-1966 standard form insurance policies issued by each such participant to Subscribing Producers; and

(b) the degree of risk each such policy presents as estimated by the Administrators.

For the purpose of implementing subdivision (b) above, the Administrators shall classify Subscribing Producers into three risk categories with the following risk relativity factors:

Risk Category	Risk Relativity
A	3
B	2
C	1

The Administrators shall assign Producers to risk categories in accordance with their respective shares of liability payments unless, by at least a two-thirds majority, they shall determine that such a method is not appropriate to reflect the relative risk and shall adopt another method.

7. Funding:

The Administrators shall direct the Chief Financial Officer to establish a Common Reserve Fund to hold all payments made by the participants under the Defense Program. There must be no co-mingling of monies received for this purpose with any other funds, monies or assets of the Facility. The Chief Financial Officer shall keep an account for each participant showing all amounts paid by the participant, and in the event the Administrators should ever determine that the defense fund appears to be greater than needed to meet the cost of defending covered claims, then they shall direct the Chief Financial Officer to refund the excess to the participants in the ratio that the total amount paid by each bears to the total amount paid by all participants.

For each calendar year the Administrators shall estimate the amount of defense expense expected to be incurred by the Facility in defending covered claims during the calendar year plus an amount appropriate in their judgment as a reserve against contingencies. The Administrators shall then determine the base standard charge and send each participant written notice of the participant's standard charge for such calendar year.

In the event the Administrators determine that the Reserve Fund is not sufficient to meet the expected defense expenses to be incurred, the Administrators shall estimate the amount required to meet the deficit. The Administrators shall then determine the base surcharge and send each participant written notice of the participant's portion of the total surcharge.

For the first calendar year of subscription the base standard charge for each pre-1966 standard policy shall be $400 unless the Administrators shall determine that such an amount is plainly not appropriate.

The following section gives a pro forma example that will enable each participant to estimate its approximate standard charge for the first year as soon as the number of its policies subject to the Defense Program and their Risk Categories are known.

8. Pro Forma Examples of Standard Charges and Surcharges:

The first example uses a base standard charge of $400 and a participant with 100 pre-1966 standard form insurance policies subject to the Program, distributed as follows: 40 in Risk Category A; 35 in Risk Category B; and 25 in Risk Category C. The participants' annual standard charge is computed as follows:

Policies	Risk Category	Risk Factor	Base Charge	Standard Charge
40	A	3	$400	$48,000
35	B	2	$400	$28,000
25	C	1	$400	$10,000
Total standard charge for the year:				$86,000

If a surcharge were determined to be required during the course of the year, it would be applied in a like manner as with the basic standard charge. This second example demonstrates the application of a surcharge as regards a participant with the same policy and risk distribution as above:

Policies	Risk Category	Risk Factor	Base Surcharge	Surcharge
40	A	3	$200	$24,000
35	B	2	$200	$14,000
25	C	1	$200	$ 5,000
Total surcharge for affected year:				$43,000

9. Appeals and Dispute Resolution:

The Administrators shall have power to resolve all disputes among participants relating to the Defense Program and, by at least a two-thirds majority, to extend equitable relief to an individual participant if a strict application of its rules or decisions would cause the participant undue and unfair hardship.

Any participant who is aggrieved by a decision of the Board by less than a two-thirds majority may submit the matter to binding nonjudicial dispute resolution under Appendix C of the Agreement.

Supreme Court, U.S.
FILED
MAY 28 1997
CLERK

96-1710

In The

Supreme Court of the United States

October Term, 1996

UNITED STATES FIRE INSURANCE COMPANY and INTERNATIONAL INSURANCE COMPANY,

Petitioners,

v.

NATIONAL GYPSUM COMPANY, n/k/a Asbestos Claims Management Corporation, NGC SETTLEMENT TRUST, and CENTER FOR CLAIMS RESOLUTION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. When a party asserts collateral estoppel as a defense against a contract claim brought in arbitration pursuant to a broad arbitration clause, and when resolution of the defense requires interpretation of the contract containing the broad arbitration clause, does the Federal Arbitration Act require that the defense be resolved in the arbitration?

2. Does prior litigation regarding the meaning of an insurance policy as applied to one coverage claim collaterally estop a subsequent arbitration regarding the effect of a separate agreement between the parties on that meaning as applied to a different coverage claim, when the scope of that separate agreement admittedly does not encompass the coverage claim decided in the prior litigation?

RULE 29.6 STATEMENT

The parent company of Respondent National Gypsum Company (n/k/a Asbestos Claims Management Corporation) is Respondent NGC Settlement Trust. National Gypsum Company has no nonwholly owned subsidiaries.

Respondent NGC Settlement Trust has neither a parent company nor any nonwholly owned subsidiaries.

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Robert L. Stern et al., *Supreme Court Practice* (7th ed. 1993) 10

RESPONDENT'S BRIEF IN OPPOSITION

Respondents National Gypsum Company and NGC Settlement Trust (collectively, "Respondents"[1]) respectfully request that this Court deny the petition for writ of certiorari that seeks review of the Second Circuit's opinion in this case.

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act provides that written arbitration provisions in any contract involving interstate or international commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1994).

STATEMENT OF THE CASE

This case arises from an insurance coverage dispute involving an agreement's effect on certain provisions in three excess liability insurance policies issued by Petitioners to National Gypsum Co. ("National Gypsum"). National Gypsum was a leading manufacturer of gypsum wallboard and other building materials that contained asbestos, and has since been sued both by claimants seeking damages for asbestos-related bodily injury and

[1] Note that, as here defined, "Respondents" does not include the Center for Claims Resolution. This Brief in Opposition is filed on behalf of only National Gypsum Company and the NGC Settlement Trust.

also by building owners seeking damages for asbestos-related property damage.

On June 19, 1985, producers of products containing asbestos (including National Gypsum) and certain of their insurers (including Petitioners) executed the Agreement Concerning Asbestos-Related Claims ("Wellington Agreement"). The Wellington Agreement resolved most insurance coverage disputes between Respondents and Petitioners with respect to third-party claims against National Gypsum for asbestos-related *bodily injuries* ("Wellington Claims"); the Wellington Agreement did *not* resolve (or even address) insurance coverage disputes over third-party claims for asbestos-related *property damage* ("Non-Wellington Claims").

By signing the Wellington Agreement, Petitioners surrendered any opportunity to associate in the defense of Wellington claims. Specifically, pursuant to section IV paragraph 1, all the signatories designated an Asbestos Claims Facility ("ACF") as their "sole agent" for the defense of Wellington Claims. (Pet. Writ Cert. App. at 56a [hereinafter Cert. App.].)[2] Although the parties dispute this point, Respondents contend that Petitioners' execution of the Wellington Agreement constitutes either consent to, or a waiver of their right to require consent to, the incurring of defense costs in Wellington Claims.

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[2] Subsequently, the ACF was dissolved; and many signatories (including National Gypsum Company and Petitioners) formed the Center for Claims Resolution to perform similar functions as the ACF.

Section VIII paragraph 6 of the Wellington Agreement contains a broad arbitration clause by which Petitioners and Respondents may resolve this present contention about the effect of the Wellington Agreement on the consent provisions contained in Petitioners' policies as applied to Wellington Claims: "Subscribing Producers and Subscribing Insurers shall resolve through alternative dispute resolution . . . any disputed issues within the scope of the [Wellington] Agreement." (*Id.* at 61a.) No defenses (including collateral estoppel) were excepted from this agreement to arbitrate. On November 2, 1993, National Gypsum initiated the alternative dispute resolution ("ADR") proceedings pursuant to this arbitration clause in order to resolve its right to defense costs in the Wellington Claims.[3]

Specifically, Respondents wish to pursue in ADR their position that Petitioners owe defense costs incurred on Wellington Claims notwithstanding the absence of some formal written "consent" by Petitioners, for the reasons set forth above. These Wellington-based arguments have never been raised before any court considering this dispute between these parties. On December 23,

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[3] Incidentally, coverage for Wellington Claims is accessed under the Wellington Agreement on a policy-by-policy basis; the timing of that access is determined by a specific allocation formula contained in the Wellington Agreement. Although the parties dispute the timeliness of Respondents' claim for Wellington-Claims defense costs, Respondents contend that they initiated the ADR as soon as appropriate under that formula (i.e., as soon as it became apparent that the Petitioners' policies would be accessed and that Petitioners did not intend to reimburse defense costs in a timely fashion). (*See* Cert. App. at 10a (noting parties' dispute on this point).)

1994, after the mediation phase of the Wellington ADR had failed, Respondents sought to initiate the next phase of Wellington ADR – arbitration. As a defense to the arbitration, Petitioners contend that Respondents are collaterally estopped from asserting their argument for defense costs incurred on Wellington Claims.

The prior judgment on which Petitioners base their collateral estoppel argument is *Stonewall Insurance Co. v. National Gypsum Co.*, No. 86 Civ. 9671 (S.D.N.Y. Mar. 22, 1993), *aff'd in relevant part*, 73 F.3d 1178 (2d Cir. 1995). That case involved National Gypsum's right to coverage for defense costs incurred on *Non*-Wellington Claims. In that case, the district court (Judge Martin) held that consent provisions in Petitioners' policies entitled Petitioners to withhold their consent to (and therefore not reimburse National Gypsum for) defense costs incurred in *Non*-Wellington Claims. In the *Stonewall* litigation (and subsequent appeal), Respondents were not free to argue the effect of the Wellington Agreement on the policies' consent provisions because the Non-Wellington Claims at issue in *Stonewall* were not within the scope of the Wellington Agreement. Even so, Petitioners contend that Respondents are now collaterally estopped from seeking Wellington-Claims defense costs in a Wellington ADR.

Rather than make that contention in the Wellington ADR, however, Petitioners filed an action in the United States District Court for the District of New Jersey seeking an injunction against the Wellington ADR based on their collateral-estoppel argument, and Respondents cross-moved for an order compelling arbitration under the Federal Arbitration Act. The case was transferred to Judge Martin in the Southern District of New York, the

same judge that issued the *Stonewall* opinion [illegible] Wellington-Claims defense costs that the Petitioners claim is issue-preclusive.

Judge Martin held that collateral estoppel is not arbitrable, (*see* Cert. App. at 15a-16a), and then agreed with Petitioners that his own prior *Stonewall* ruling collaterally estopped Respondents from seeking Wellington-Claims defense costs in a Wellington ADR, (*see id.* at 20a). On this second point, Judge Martin interpreted the Wellington Agreement as adopting the common-law rule of *contra proferentum*. (*See id.* at 18a.) Judge Martin reasoned that because the Wellington Agreement essentially restates the same rule of *contra proferentum* that he applied in his *Stonewall* decision, the issue of defense-costs coverage for Wellington claims was identical to the issue of defense-costs coverage for Non-Wellington Claims. (*See id.* at 20a.) Because the parties had already litigated the issue of defense-costs coverage for *Non*-Wellington Claims in the *Stonewall* litigation, Judge Martin concluded that Respondents were collaterally estopped from arbitrating the issue of defense-costs coverage for Wellington Claims in a Wellington ADR. Finally, as relief, Judge Martin invoked his power under the All Writs Act to enjoin the Wellington ADR. (*See id.* at 21a.)

On appeal, Petitioners and Respondents filed briefs addressing Judge Martin's holdings on both the arbitrability and merits of collateral estoppel. In a unanimous decision, the Second Circuit reversed Judge Martin's arbitrability holding. After noting the strong federal presumption of arbitrability, the court held that Judge Martin had based his collateral-estoppel holding on his own interpretation of the Wellington Agreement. (*See id.* at

7a-8a.) Because "[a]t least one facet of the [collateral estoppel] dispute thus requires interpretation of Wellington," the Second Circuit held that the dispute should have been decided by an arbitrator. (*Id.* at 8a.)

As additional support for its reversal, the Second Circuit held that collateral estoppel was not "so obscure a question" as to "cast doubt upon whether the parties intended that it be subject to arbitration." (*Id.*) In this regard, the court also reasoned that, because parties may agree to waive the collateral-estoppel defense in an arbitration, they may likewise agree to arbitrate the defense. (*See id.* at 9a.) Finally, the court noted prior Second Circuit case law holding that collateral estoppel is itself "part of the dispute on the merits," so that a broad agreement to arbitrate a particular dispute encompasses standard defenses to that dispute like collateral estoppel. (*Id.* at 9a-10a.) In light of its disposition of the arbitrability question, the Second Circuit did not reach Judge Martin's holding on the merits of collateral estoppel. Instead, it compelled arbitration of the dispute that Respondents have desired to arbitrate since December 1994: the effect of the Wellington Agreement on the consent provisions in Petitioners' policies. The court noted that Petitioners were free to assert the defense of collateral estoppel in the arbitration. (*See id.* at 10a.)

On January 30, 1997 the Second Circuit panel that heard this case denied Petitioners' motion for rehearing, and advised the parties that no Second Circuit judge in regular active service had requested that a vote be taken on Petitioners' suggestion for a rehearing en banc. On February 25, 1997, the Second Circuit denied Petitioners'

motion for a stay of arbitration pending disposition by this Court of their Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. THE PETITIONERS' FIRST AND THIRD QUESTIONS PRESENTED WOULD REQUIRE THIS COURT TO FIRST RESOLVE THE MERITS OF A COLLATERAL ESTOPPEL DISPUTE THAT NEITHER WAS DECIDED BY THE SECOND CIRCUIT NOR IS WORTHY OF THIS COURT'S REVIEW.

Petitioners' first Question Presented asks whether the All Writs Act permits a federal district court to "protect" its prior judgment by enjoining an arbitration of issues "previously adjudicated between the same parties by that court." This question improperly assumes that Judge Martin "previously adjudicated" Respondents' right to Wellington-Claims defense costs, the crux of the very dispute that the Second Circuit has ordered the parties to arbitrate – collateral estoppel. Similarly, the third Question Presented assumes that Judge Martin's *Stonewall* decision has a "preclusive effect" to be enforced in this proceeding. Again, it assumes a particular resolution of the entire dispute underlying this case – collateral estoppel.

In this proceeding, the Second Circuit did not decide what Petitioners would ask this Court to assume. Specifically, the Second Circuit did not decide that the parties have previously litigated the issue underlying Respondents' coverage claim in this case; this question was explicitly left to the arbitrator. (*See* Pet. App. at 10a.)

Thus, the Second Circuit had no reason to decide (and did not decide) the "Questions Presented" that Petitioners derive from that assumption – i.e., whether the All Writs Act permits a judge to enjoin an arbitration of an issue "previously adjudicated," or whether the All Writs Act confers enforceable rights on private litigants.

Indeed, the Second Circuit did not even mention the All Writs Act in its opinion, and properly so. Before a court may evaluate the particular remedies permitted by the All Writs Act, there must first be a determination that there is occasion for a remedy. In this case, that occasion could be threatened relitigation of an identical issue; but there is no final determination that Respondents' desired arbitration threatens relitigation of an issue already decided elsewhere. Until such time, there is no need to opine what remedy would be appropriate (under the All Writs Act or any other act) in such circumstances.

Furthermore, the merits of collateral estoppel (the prior resolution of which is a necessary assumption underlying the first and third Questions Presented) is not sufficiently important to warrant this Court's review.[4] In short, Respondents seek to arbitrate their right to defense costs for Wellington Claims. Although *Stonewall* held, in regard to *Non*-Wellington Claims, that the consent provisions in Petitioners' policies precluded Respondents' recovery of *Non*-Wellington-Claim defense costs, Respondents seek to argue in arbitration that the Wellington

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[4] The second Question Presented in this Brief in Opposition poses the collateral-estoppel issue in this case. Until this issue is resolved, Petitioners' first and third Questions Presented are purely hypothetical.

Agreement impacted the meaning of the consent provisions at issue in *Stonewall*. Specifically, Respondents contend that by signing the Wellington Agreement, Petitioners either consented to, or waived any right to require consent to, Respondents' payment of defense costs in the Wellington Claims. This argument was unavailable to Respondents in *Stonewall* because the scope of the Wellington Agreement does not extend to Non-Wellington Claims.

Although Respondents are eager to make their arguments on the merits of the collateral estoppel issue, Respondents respectfully suggest that the issue is not worthy of certiorari. *See Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955) (" '[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties. . . . ' ") (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

II. THE PETITIONERS' THIRD QUESTION PRESENTED WAS NEITHER RAISED BEFORE NOR DECIDED BY THE SECOND CIRCUIT.

The Second Circuit did not decide whether the All Writs Act confers any enforceable "right" on private litigants, the inquiry underlying Petitioners' third Question Presented. Moreover, the Petitioners never raised this issue in any court below. This particular Question Presented is an entirely new formulation of Petitioners' contentions that is found nowhere else in the record of this

case. In short, it simply cannot be extracted from either the opinion below or the Petitioners' prior arguments. *See, e.g., Sisson v. Ruby,* 497 U.S. 358, 359 n.1 (1990) (declining to consider argument not raised below); *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981) (holding that question "not raised in the Court of Appeals" was "not properly before" Court); *United States v. Mendenhall,* 446 U.S. 544, 552 n.5 (1980) ("[T]he Court ordinarily does not consider matters neither raised before nor decided by the courts below. . . . "). Respondents located *no* argument in *any* source that the All Writs Act confers rights on private litigants, much less an argument in this case's record.

III. THE ALLEGEDLY CONFLICTING DECISIONS ARE DISTINGUISHABLE ON THEIR FACTS, THEIR LAW, OR BOTH.

Even assuming that a conflict among the circuits, without more, is enough to warrant certiorari, Petitioners have demonstrated no "real and embarrassing" conflict. *Rice v. Sioux City Mem'l Park Cemetery, Inc.,* 349 U.S. 70, 79 (1955). As stated by a leading treatise, a certiorari-worthy conflict cannot be "merely an inconsistency in dicta or in the general principles utilized." Robert L. Stern et al., *Supreme Court Practice* § 4.3, at 167 (7th ed. 1993). Petitioners cite four other circuit court opinions, none of which demonstrate a direct conflict. (*See* Pet. Writ Cert. at 6.)

The supposedly conflicting holding from the Third Circuit is mere dicta. *See Telephone Workers Union v. New*

Jersey Bell Telephone Co., 584 F.2d 31 (3d Cir. 1978). Moreover, that case did not involve an agreement to arbitrate, but rather a final award in a labor arbitration that was contrary to a prior judicial consent decree. *See id.* at 32. Also, the court's dictum suggesting that the result would have been the same in an action to compel arbitration is inconsistent with more recent Third Circuit authority holding that collateral estoppel *is* an issue for arbitrators. *See Local 863 Int'l Bhd. of Teamsters v. Jersey Coast Egg Producers, Inc.*, 773 F.2d 530, 534 (3d Cir. 1985) ("Assuming, *arguendo*, that this doctrine of collateral estoppel precludes relitigation . . . it remains within the arbitrator's purview to interpret the impact of such a finding. . . . "); *Butler Armco Indep. Union v. Armco Inc.*, 701 F.2d 253, 256 (3d Cir. 1983) (" '[W]e conclude that it is for the arbitrator to evaluate . . . whether [the prior arbitration award] qualifies . . . as the same "question or issue" presented by the immediate grievance. . . . ' ") (quoting *Local 103 of the Int'l Union of Elec., Radio & Mach. Workers v. RCA Corp.*, 516 F.2d 1336, 1340-41 (3d Cir. 1975)).

Finally, *Telephone Workers* has been cited as an example of applying the "public policy" exception to arbitrability. *See Perma-Line Corp. of Am v. Sign Pictorial & Display Union, Local 230*, 639 F.2d 890, 895 (2d Cir. 1981). But the "public policy" exception, and therefore *Telephone Workers*, has since eroded as courts have become more trusting in the arbitration process. Thus, the Second Circuit's opinion in this case does not conflict with *Telephone Workers* because *Telephone Workers* (1) involved substantially different facts, (2) presents, at most, an inconsistency in dicta, and (3) has lost all weight as authority by

reason of *Jersey Coast* and *Butler Armco*, and of the demise of the "public policy" exception to arbitrability.

Nor is there any conflict between the Second Circuit's opinion in this case and *Ewart v. Y&A Group, Inc. (In re Y&A Group Securities Litigation)*, 38 F.3d 380 (8th Cir. 1994). *Y&A Group* demonstrates only that a court may block arbitration in narrow circumstances not present here. In *Y&A Group*, a class action, the district court had entered an express injunction barring relitigation based on a settlement in which the plaintiffs released all claims against all potential defendants. The district court later issued a preliminary injunction staying an arbitration that a plaintiff pursued in violation of the earlier injunction. *See* 38 F.3d at 384-85.

Y&A Group did *not* hold that a party may ignore an agreement to arbitrate simply because it intends to assert collateral estoppel arising from a prior judgment. Instead, it held that because "the court which issues an injunction is the only one with authority to enforce it," *id.* at 383, a court may issue an injunction to restrain a violation of its own earlier injunction. *See also id.* at 384-85 (Arnold, C.J., concurring) ("I do not read this Court's opinion today to hold generally that courts may, by injunction, control the decision of arbitrators on questions of issue or claim preclusion. In the present case, though, the judgment in question also included an express injunction barring relitigation, and I would be most reluctant to say that a court cannot enforce its own pre-existing injunctive order.").

Thus, *Y&A Group* does not present a real conflict on the same matter of law or fact. In this dispute (as in

virtually all cases in which a party asserts preclusion), the Petitioners rely only on a judgment, not an injunction against arbitration; there is no claim that Respondents are in contempt of court for violating any injunction against arbitration. In fact, absent an injunction as in *Y&A Group*, the Eighth Circuit is in full accord with the Second Circuit's opinion in this case. *See Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1425 (8th Cir. 1986) ("[A]n arbitrator generally has the power to determine whether a prior award is to be given preclusive effect.").

Nor is a direct conflict created by *Miller Brewing Co. v. Ft. Worth Distilling Co.*, 781 F.2d 494 (5th Cir. 1986). In that case, the court did not reach the arbitrability issue until after its holding in the case: that the party seeking to arbitrate had waived its right to do so. *See id.* at 497. Only after reaching that holding did the court comment on arbitrability. As dicta, those comments do not create a direct conflict with the Second Circuit's opinion in this case.

Finally, in *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067 (11th Cir. 1993) (per curiam), the court held that res judicata is not arbitrable. Thus, because the Second Circuit's opinion involved collateral estoppel, the Eleventh Circuit's decision is not a real conflict on the same matter of law. Moreover, to reach its holding, the court simply noted the virtues of res judicata. In this case, the Second Circuit reached its holding by concluding that addressing the merits of collateral estoppel required interpretation of a document (the Wellington Agreement) that only an arbitrator could interpret. Never mind that these two cases did not consider the

same matter of law. They do not even demonstrate an inconsistency in general principles utilized; indeed, each utilized completely different principles.

In sum, Petitioners have demonstrated no "real and embarrassing" conflict among the courts of appeals. To the contrary, the courts of appeals are trending toward agreement on the arbitrability of preclusion doctrines. *See Aircraft Braking Sys. Corp. v. Local 856, United Auto., Aerospace & Agric. Implement Workers*, 97 F.3d 155, 159 (6th Cir. 1996) (holding that arbitrators "generally are entitled to determine in the first instance whether to give the prior judicial determination preclusive effect"), *cert. denied*, 117 S. Ct. 1311 (1997); *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1425 (8th Cir. 1986) ("[A]n arbitrator generally has the power to determine whether a prior award is to be given preclusive effect."); *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 860 F.2d 1420, 1424 (7th Cir. 1988) ("Procedural issues, including . . . the res judicata effect of a prior arbitration award . . . are for the arbitrator. . . . "); *Local Union No. 370 of the Int'l Union of Operating Eng'rs v. Morrison-Knudsen Co.*, 786 F.2d 1356, 1358 (9th Cir. 1986) ("[D]efenses of collateral estoppel and equitable estoppel[ ] are subject to arbitration."); *Little Six Corp. v. United Mine Workers, Local Union No. 8332*, 701 F.3d 1356, 1358 (4th Cir. 1986) ("[T]here is solid, well-reasoned case law holding that the preclusive effect of a prior arbitral award is itself a question for arbitration."); *Local 863 Int'l Bhd. of Teamsters v. Jersey Coast Egg Producers, Inc.*, 773 F.2d 530, 534 (3d Cir. 1985) ("Assuming, *arguendo*, that this doctrine of collateral estoppel precludes relitigation . . . it remains within the arbitrator's purview to interpret the impact of such a

finding. . . . "); Michael A. Knoerzer, *Collateral Estoppel and Arbitration*, Mealey's Litig. Rep.: Reins., Mar. 12, 1997, at 23, 24 ("While the Second Circuit appears to be at the vanguard on this issue, *most other courts agree* that the collateral estoppel issue is ordinarily to be decided by the arbitrators.") (emphasis added).

Even assuming some conflict in dicta or principles utilized by the circuits, such conflict would be far from mature. *See Miller v. Runyon*, 77 F.3d 189, 194 (7th Cir.) ("When . . . a party is seeking . . . to constrain the arbitrator, he *may not (or may – we cannot find a case)* be able to obtain injunctive or other judicial relief in advance of the arbitration . . . and so may have to take his chances on persuading the arbitrator to apply collateral estoppel.") (emphasis added), *cert. denied*, 117 S. Ct. 316 (1996). Respondents located no circuit court decision that has explicitly acknowledged that its holding on the arbitrability of collateral estoppel is in conflict with that of another circuit, and at least one commentator has discussed the arbitrability of collateral estoppel as an issue that has only emerged in "[r]ecent decisions by the Federal Courts of Appeal." Knoerzer, *supra*, at 23.

IV. THE SECOND CIRCUIT FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES.

The Petitioners' petition is largely a rehash of arguments that failed to sway the Second Circuit. That court correctly ignored Petitioners' persistent rally around the residual and off-point authority of the All Writs Act. The arbitrability of collateral estoppel is governed by the Federal Arbitration Act, not the All Writs Act. *See Carlisle*

v. United States, 116 S. Ct. 1460, 1467 (1996) (" 'Where a statute specifically addresses the issue at hand, it is that authority, and not the All Writs Act, that is controlling.' ") (quoting *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985)). The All Writs Act did not change the black letter law on arbitrability. The Federal Arbitration Act contains no exception for a judge's ad hoc feeling about what is "appropriate" and "necessary" under the All Writs Act.

The Second Circuit's holding relied largely on the fact that Judge Martin's resolution of the parties' collateral estoppel dispute hinged on Judge Martin's interpretation of a contract subject to a broad arbitration clause: "[T]he district court had to interpret Wellington in order to rule on the question of issue preclusion. At least one facet of the dispute thus requires interpretation of Wellington, plainly a question for the arbitrator rather than for the district court to decide." (Pet. App. at 8a.) This fact – resolution of the merits of collateral estoppel requires the interpretation of an agreement subject to a broad arbitration clause – is dispositive of collateral estoppel's arbitrability in this case, and no contrary arguments in Petitioners' certiorari petition are persuasive.

A dispute is arbitrable if, with all doubts resolved in favor of arbitration: (1) the parties agreed to arbitrate and (2) the scope of that agreement encompasses the present dispute. The Petitioners graft their own preliminary step on to this Court's two-step arbitrability rule by arguing that a prior "final adjudication of a dispute" "extinguishes any justiciable controversy" that could have been

arbitrated. (Pet. Writ Cert. at 15.) But Petitioners' proposed new step renders collateral estoppel's *merits* dispositive of collateral estoppel's *arbitrability*. The merits of a dispute have no bearing on the arbitrability of a dispute. *See, e.g., United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960) ("The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.").

Petitioners repeatedly insist that prior federal judgments must be "protected." (*See, e.g.*, Pet. Writ Cert. at 19 ("The gravamen of the issues presented in this case is not merely one of enforcing an arbitration agreement . . . but [one] of protecting a valid federal judgment.").) This repeated plea for "protection" of a prior judgment betrays a rather outdated and unfounded distrust of the competence of arbitrators to apply the doctrine of collateral estoppel. Collateral estoppel itself "protects" prior judgments. Thus, the question presented by this case is not *whether* prior judgments will be "protected," but rather *who* will "protect" such prior judgments. The Petitioners have advanced no reason or authority why arbitrators cannot be trusted to competently apply preclusion doctrines.

The Petitioners' implicit argument that a Wellington arbitrator might not correctly determine the applicability of the principle of collateral estoppel is inconsistent with the holding of this Court in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322 (1995). In that case, the petitioners contended that foreign arbitrators would not properly apply choice-of-law principles. This Court rejected the petitioners' "skepticism over the ability of foreign arbitrators to apply [the applicable law]," *see id.* at

2328, and instead held that the circuit court "was correct to reserve judgment on the choice-of-law question, as it must be decided in the first instance by the arbitrator," *see id.* at 2330.

Respondents here seek only to enforce a broad arbitration agreement that makes no exception for collateral estoppel or any other defense. *See Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1727 (1996) (describing the "enforcement of arbitration agreements" as "a substantial federal concern"). Petitioners' fear that such arbitration will open Judge Martin's *Stonewall* ruling to "collateral attack" is unfounded. Again, Petitioners offer no reason or authority suggesting that an arbitrator will not faithfully and competently apply the doctrine of collateral estoppel.

In their final argument, Petitioners suggest that collateral estoppel was not "within the parties' contemplation at the time of their contractual undertaking to arbitrate," (Pet. Writ Cert. at 24), so that collateral estoppel is so "arcane" as to require resolution by a court under the holding of *First Options, Inc. v. Kaplan*, 115 S. Ct. 1920 (1995). The Wellington Agreement resolved only coverage disputes arising from alleged third-party asbestos-related *bodily injuries*; its scope did not encompass coverage disputes arising (under the same insurance policies) from alleged third-party asbestos-related *property damage*. As the Wellington Agreement resolved only the former class of claims, litigation over (and therefore judicial resolution of coverage issues in) the latter class of claims was entirely foreseeable. If the signatories to the Wellington Agreement desired that the collateral estoppel effect of such litigation on Wellington ADRs be decided

by a court, they should have excepted collateral estoppel from the Wellington Agreement's broad arbitration clause. *See First Options*, 115 S. Ct. at 1924 ("[G]iven the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter."); *see also National Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 135 (2d Cir. 1996) (rejecting argument that *First Options* requires collateral estoppel to be decided by a court).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 96-1710

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES FIRE INSURANCE COMPANY
and INTERNATIONAL INSURANCE COMPANY,

Petitioners,

—v.—

NATIONAL GYPSUM COMPANY, n/k/a Asbestos Claims Management Corporation, NGC SETTLEMENT TRUST, and CENTER FOR CLAIMS RESOLUTION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED

I. Whether the scope of a United States District Court's power to protect its own judgment, codified by the All Writs Act, 28 U.S.C. § 1651, includes the power to enjoin arbitration of issues previously adjudicated between the same parties by that court.

II. Whether the District Courts may properly resolve the preclusion effects of their own prior judgments, rather than leave those issues for arbitrators to decide.

III. Whether the All Writs Act, 28 U.S.C. § 1651, affords litigants a right to judicial enforcement of the preclusive effect of federal judgments, that is not waived absent clear evidence that a party has done so.

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Pursuant to Rule 29.6 Petitioners, United States Fire Insurance Company and International Insurance Company certify that their parent corporations are in ascending order as follows:

United States Fire Insurance Company:

Crum & Forster Holdings, Inc.

Talegen Holdings, Inc.

Xerox Financial Services, Inc.

Xerox Corporation

International Insurance Company:

The Resolution Group, Inc.

Xerox Financial Services, Inc.

Xerox Corporation

There are no non-wholly owned subsidiary companies of United States Fire Insurance Company or International Insurance Company.

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Petitioners, United States Fire Insurance Company and International Insurance Company ("Petitioners"), respectfully submit the within reply to Respondents National Gypsum Company's and NGC Settlement Trust's (collectively, "Respondents") Brief in Opposition to Petitioners' Petition for Writ of Certiorari.

ARGUMENT

THE CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS OVER THE QUESTION OF WHETHER THE FEDERAL COURTS OR ARBITRATORS DECIDE THE PRECLUSIVE EFFECT OF A PRIOR FEDERAL JUDGMENT ON A SUBSEQUENT ARBITRATION IS BOTH A "REAL AND EMBARRASSING CONFLICT" RIPE FOR SUPREME COURT RESOLUTION AND THE QUESTIONS PRESENTED ARE NOT "HYPOTHETICAL".

Respondents dismiss as "merely an inconsistency in dicta" the clear, real and embarrassing conflict that presently exists among Third, Fifth, Eighth and Eleventh Circuits on the one hand and the Second Circuit on the other over the important question of whether a federal district court may properly inquire into, and enjoin, the arbitration of issues previously adjudicated between the same parties. Respondent argues further that Petitioner's Questions Presented I and III are merely "hypothetical" because they "improperly assume" that the district court resolved Respondent's right to bodily injury claim defense costs.

A. Petitioners' Questions Presented are Properly Before the Court And Are Not "Hypothetical"

The Questions Presented do not "improperly assume" that the district court below " 'previously adjudicated' Respondents' right to Wellington-Claims defense costs" as Gypsum contends. (Resp. Br. 7). Rather, the Questions Presented are

based on the fact that the district court specifically determined that it had adjudicated Respondents' defense costs claims under the excess liability insurance policies at issue. (*See* Pet. App. 17a).

In the district court proceedings below, Respondents conceded that the policies of excess liability insurance at issue do not treat differently property damage claims and bodily injury claims with respect to the existence or non-existence of a defense obligation under those policies. (*See id.* at 18a). Indeed, it is uncontroverted that the policy language addressing defense applies to all claims that are covered under the policies. Therefore, the fact that the court's earlier ruling in *Stonewall Ins. Co. v. National Gypsum Co.*, No. 86 Civ. 9671 (S.D.N.Y. Mar. 22, 1993) *aff'd. in relevant part*, 73 F.3d 1178 (2nd Cir. 1995) on the defense obligation issue occurred within the context of property damage claims rather than bodily injury claims was of no consequence, *unless* the Wellington Agreement somehow altered the coverage of the policies.

Upon review of the Wellington Agreement provisions that Respondents claimed manifested an insurer's consent to, or a waiver of its right to require consent to, the incurring of defense cost in bodily injury claims—Section XI ¶¶ 1 and 3—(Pet. App. 64a-65a) the district court rejected Respondents' contentions. (*Id.* at 18a-19a). The district court recognized that the Wellington Agreement merely incorporated the common law doctrine of *contra proferentum*, which holds that ambiguous policy language must be construed against the insurer. *Id.*

The district court further observed that its conclusion that the Wellington standard for establishing an exclusion for coverage was substantially the same as that of common law precepts of insurance law of the various States, and that the Wellington Agreement alters neither the construction of insurance policy coverage terms nor the legal standard to be applied in the construction of those terms was in complete

accord with the recent decision by the Court of Appeals for the Third Circuit in *North River Insurance Company v. CIGNA Reinsurance*, 52 F.3d 1194 (3rd Cir. 1995). (*See* Pet. App. 19a-20a). In *North River*, the court of appeals squarely rejected the contention advanced by Respondents that an insurer's execution of the Wellington Agreement constituted consent to the expansion of the defense obligation under its policies. (*See* Pet. App. 19a-20a).

Since that time, Respondents have understandably backed away from specifying the Wellington language it contends constitute Petitioners' "consent to, or waiver of their right to require consent to, the incurring of defense costs" (*See* Resp. Br. 2), preferring instead, to adopt what may best be described as a "somewhere in Wellington" approach to the question. However, the illogical nature of Respondents' position is perhaps best reflected in the fact that the Wellington Agreement specifically preserved all existing defense obligation disputes between insurers and their insureds for arbitration. (Pet. App. 99a-100a ¶4). Respondents have never offered an explanation as to how execution of an instrument that specifically preserves defense obligation disputes may create the very obligation that one party maintains does not exist.

Thus, the fact that the Second Circuit reversed the finding of the district court on the grounds that, in its view, an arbitrator, rather than the district court, should have made the preclusion determination, does not alter the fact that the district court made the specific finding that, in resolving the defense obligation question in *Stonewall*, the court had adjudicated Respondents' rights to defense on *all* categories of claims. (Pet. App. 17a-18a). With respect to Question Presented III, since the inception of the within action, Petitioners' have consistently argued that they are entitled to judicial enforcement of the preclusive effect of the *Stonewall* judgment under the All Writs Act, 28 U.S.C. § 1651, in the form of injunctive relief, in order to prevent Respondents' efforts at vexatious, unwarranted relitigation of the defense obligation

issues. Respondents characterizations to the contrary are inaccurate.

As set forth fully in the Petition for Certiorari, compelling reasons exist for authorizing the district court to conduct the limited threshold inquiry to determine whether or not to apply preclusion in light of the prior federal judicial judgment. Petitioners submit that, like questions of arbitrability and the arbitrability of arbitrability (*i.e.* whether the parties have agreed to arbitrate, and who decides whether they have so agreed), the preclusion doctrines are "higher-order" questions when their application implicates a prior federal judgment, because the interest sought to be vindicated by the proper application of the preclusion doctrines in that context are central to the fundamental purpose for which the civil courts were established: "the conclusive resolution of disputes"; the fostering of "reliance on judicial action by minimizing the possibility of inconsistent ruling" on the merits, and the protection of prevailing parties from vexatious relitigation. *See Montana v. United States*, 440 U.S. 147, 153-154 (1979) (Pet. Writ Cert. 14-15). Respondents offer no persuasive countervailing argument other than to cling to the general two-step arbitrability rule which does not contemplate the factual situation of a prior federal judgment.

B. The Conflict Among the Circuits is Real and Certiorari-Worthy

In an astounding exercise of sheer sophistry, Respondents argue that no real conflict exists among the circuits so as to create a certiorari-worthy conflict on the question of whether the district courts may resolve the preclusion effects of their own prior judgment, rather than leave those issues to arbitrators to decide. (Resp. Br. 10-15). Petitioners respectfully submit that the present conflict among the circuits on this issue is not only very real, but that the confusion and uncertainty reflected in the most recent cases which address this

question urgently manifest the need for guidance by the Supreme Court.

In the instant case, the Second Circuit holds that the preclusion effect of a prior federal judgment is merely an affirmative defense which, notwithstanding the implication of federal judicial action, is to be treated no differently than affirmative defenses arising solely out of the pre-litigation conduct of parties. (*See* Pet. App. 9a). In the Second Circuit's view, "issue preclusion, like other defenses to arbitrability, is arbitrable, and because issue preclusion can be arbitrated, it must be arbitrated." (*Id.* at 6a).

In contrast, the Eleventh Circuit, addressing the same issue—whether the preclusive effect of a prior federal judgment should be decided by the federal courts or left to arbitrators—and having considered the same arguments presented to the Second Circuit, held that "the better rule" is to permit the court to make the determination. "The issue," the Eleventh Circuit reasoned, "is not just one of preventing piecemeal litigation . . . but of protecting prior judgments." *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067, 1069 (11th Cir. 1993). Respondents seek to distinguish *Kelly* by observing that the decision involved res judicata, rather than collateral estoppel. However, Respondents offer no authority or reason to distinguish cases involving res judicata and collateral estoppel. To the contrary, in fact, courts have recognized that "the differences between [res judicata and collateral estoppel] are irrelevant" in determining whether an arbitrator is precluded from re-deciding previously adjudicated matters. *See e.g. Aircraft Breaking Sys. Corp. v. Local 856, United Auto., Aerospace & Agric. Implement Workers*, 97 F.3d 155, 161 n.2 (6th Cir. 1996) *cert. denied*, 117 S. Ct. 1311 (1997).

In *Miller Brewing Co. v. Ft. Worth Distilling Co.*, 781 F.2d 494 (5th Cir. 1986) the Fifth Circuit held that under the Federal Arbitration Act, "parties should be barred from seeking

relief from arbitration panels when, under the doctrine of res judicata, they would be barred from seeking relief in the courts." 781 F.2d at 499 (citations omitted). Respondents make no effort to distinguish this holding and the five columns of legal and factual analysis that support it, but simply dismisses the entire section of the opinion as merely a "comment on arbitrability" which may be disregarded as "dicta". (Resp. Br. 13).

The Eighth Circuit in *In re Y&A Group Sec. Litig.* 38 F.3d 380 (8th Cir. 1994) expressly followed *Kelly* and *Miller Brewing*. *See In Re Y&A*, 38 F.3d at 382 ("We conclude that the reasoning of *Kelly* and *Miller Brewing* is dispositive of the issue of the district court's power.") Citing to the *concurring* opinion, Respondents maintain that *In Re Y&A* pertains only to prior injunctions and not to other types of judgments. (Resp. Br. 12-13). The majority opinion, however, recognized no such distinction. While *In Re Y&A* involved the enforcement of a final judgment in a class action which incorporated a release and an injunction against future claims covered by the release, the majority makes clear that the existence of the injunction was not dispositive. Rather, it was "the reasoning of the [Eleventh Circuit] in *Kelly* and [the Fifth Circuit] in *Miller Brewing*" which the majority found "dispositive of the issue of the district court's power" to enjoin arbitration under the All Writs Act. *See* 38 F.3d at 382. In fact, the majority opinion consistently refers to the resolution of the prior proceeding, not as an injunction, but as a "final judgment." *See In Re Y&A Group*, 38 F.3d at 381-82.

In *Telephone Workers Union v. N.J. Bell Tel.*, 584 F.2d 31 (3rd. Cir. 1978) the Third Circuit unequivocally held that "[w]hen *a federal court* is presented with the contention that a prior federal judgment determined issues now sought to be relitigated in an arbitral forum *it must first determine the effect of the judgment*." 584 F.2d at 33 (emphasis added). Nor is *Telephone Workers* inconsistent with *Local 863 Int'l. Bhd. of Teamsters v. Jersey Coast Egg Producers, Inc.*, 773 F.2d

530 (3rd. Cir. 1985) or *Butler Armco Indep. Union v. Armco, Inc.*, 701 F.2d 253 (3rd. Cir. 1983), as Respondents contend. In *Jersey Coast*, a labor case, the court held that an arbitrator should decide whether or not an employee's prior municipal court theft conviction constituted just cause for his dismissal under the terms of a collective bargaining agreement. *See Jersey Coast*, 733 F.2d at 534. In *Butler Armco*, another labor case, the court held that an arbitrator should determine whether or not a dispute was covered by a *re-arbitration* clause in the parties' collective bargaining agreement. *See Butler Armco*, 701 F.2d at 256. Neither *Butler Armco* nor *Jersey Coast* involved the enforcement of a prior court judgment and neither decision erodes the precedential authority of *Telephone Workers*.

C. The Second Circuit's Decision is Starkly Inconsistent With the Majority of Courts That Have Addressed The Preclusive Effect of Prior Judicial Judgments On Subsequent Arbitrations.

Respondents vainly attempt to show a "trending toward agreement" among the courts of appeals "on the arbitrability of preclusion doctrines" by citing a string of inapposite cases which predominantly involve the preclusive effect of prior arbitration awards. (Resp. Br. 14). The issue of whether the preclusion principles have the same doctrinal force in arbitration proceedings as they do in judicial proceedings is not among the questions presented by Petitioners' application, and it is respectfully submitted that whatever "trends" may or may not be developing among the courts of appeals on the authority of arbitrators to decide the preclusive effect of earlier arbitration awards, those decisions are not germane to the substance of questions presented here: Whether the preclusive effect of a federal judgment issued at the conclusion of a *federal plenary trial* should be determined by the tribunal that rendered it.

In fact, contrary to the thrust of Respondents' "trending toward agreement" argument, the Seventh Circuit in *Miller v. Runyon*, 77 F.3d 189 (7th Cir.) *cert. denied*, 117 S. Ct. 316 (1996), has only recently observed that the "majority" of courts that have considered whether a judge or an arbitrator should decide the res judicata or collateral estoppel effect of a prior court judgment on a subsequent arbitration hold "that the preclusive effect of the judgment is determined by the tribunal that rendered it." 77 F.3d at 194. *In Re Y&A*, *Kelly*, and *Miller Brewing* are cited as the leading cases supporting the "majority" rule. *See id.* at 193.[1] Thus, contrary to Respondents' assertions, the Second Circuit's decision that the preclusive effect of a prior judicial judgment is merely a merits-related defense, which, like other defenses, must be arbitrated stands in stark contrast to the majority position on the question of whether courts or arbitrators decide the preclusive effect of prior court judgments.

Respondents are correct on one point: the issue presented in this case is who should decide—court or arbitrator—the preclusive effect of a prior federal judgment. (Resp. Br. 17) (Pet. Writ Cert. 6). Respondents argue, and the Second Circuit holds, that Federal District Courts must rely on arbitrators rather than on their own inherent powers codified under the All Writs Act to enforce their judgments as collateral estoppel to prevent collateral attack on those judgments by disgruntled litigants. If Respondents and the Second Circuit are

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[1] Respondents quotation from *Runyon*, intending to show a dearth of case law on the issue of whether courts or arbitrators decide the preclusive effect of prior judicial judgments, is misleading. The passage quoted by Respondents involved the courts' hypothetical of what might be the appropriate disposition of a party's request "*not to bar* but merely constrain the arbitrator . . ." *Miller v. Runyon*, *supra.*, 77 F.3d at 194 (emphasis added). The court observed that in contrast to the development of case law addressing the situation (such as in the instant case) where a party is seeking to bar arbitration, no case law had been found where a party sought merely to limit the arbitral process on preclusion grounds. *See id.*

correct on this issue, the Courts of Appeals for the Third, Fifth, Eighth and Eleventh Circuits are plainly incorrect. Either way, the conflict among the circuits is real, not illusory. Nor do Respondents dispute the confusion and uncertainty concerning these issues clearly manifest in the Sixth Circuit's decision in *Aircraft Braking Sys. Corp. v. Local 856, United Auto., Aerospace & Agric. Implement Workers, supra.*, 97 F.3d 155. Indeed, Respondents refer to the *Aircraft Braking* decision only once, in their "trending toward agreement" string citation, for the erroneous proposition that the majority of circuits hold that arbitrators "generally are entitled to determine in the first instance whether to give [ ] prior judicial determination[s] preclusive effect." (Resp. Br. 14) (quoting *Aircraft Braking*, 97 F.3d at 159 (citing *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1425 (8th Cir. 1986) (holding that an arbitrator generally has the power to determine whether a prior [*arbitration*] award is to be given preclusive effect."))) (emphasis added). *But cf. Miller v. Runyon*, 77 F.3d at 194 (observing that the majority of cases hold that the preclusive effect of a prior judicial judgment on a subsequent arbitration is decided by the tribunal that rendered the judgment).

Thus, the presently existing conflict among the Circuits on the issue of who decides—court or arbitrator—the preclusive effect of a prior federal court judgment is both "real and embarrassing" and urgently requires Supreme Court guidance.

CONCLUSION

For all the foregoing reasons, and for the reasons more fully set forth in Petitioners' Petition for Writ of Certiorari, Petitioners, United States Fire Insurance Company and International Insurance Company, urge the Court to grant Certiorari.

Respectfully submitted,

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